CHAPTER 2

THE REPRESENTATION PROCESS

2-1. Introduction.

a. Recognition. Under the Federal Service Labor-Management Relations Statute, (5 U.S.C. §§ 7101 - 7135) (FSLMRS) labor organizations may represent Federal employees in four situations:

(1) exclusive recognition §§ 7103(a)(16) and 7111;

(2) national consultation rights § 7113;

(3) consultation rights on government-wide rules or regulations § 7117(d); and

(4) dues allotment recognition § 7115(c).

The first two varieties of recognition are carried over from EO 11491; the latter two were created by FSLMRS. Because most labor counselors do not become involved with the latter three, this text will merely define them. It will address in detail the exclusive recognition form of representation.

b. National consultation rights (NCR). A union accorded NCR by an agency or a primary national subdivision of an agency is entitled (1) to be informed of any substantive change in conditions of employment proposed by the agency, (2) to be permitted a reasonable amount of time to present its views and recommendations regarding the proposed changes, (3) to have its views and recommendations considered by the agency before the agency acts, and (4) to receive from the agency a written statement of the reasons for the action taken. 5 U.S.C. § 7113(b). To qualify, the union must hold exclusive recognition either for at least 10% or for 3,500 of the civilian employees of the agency or the primary national subdivision (PNS), provided that the union does not already hold national exclusive recognition. 5 C.F.R. § 2426.1

c. Consultation rights on government-wide rules or regulations. Under this form of recognition, the rights of a union accorded consultation rights are comparable to those under national consultation rights. The chief difference is that only agencies issuing government-wide rules and regulations can grant such recognition. 5 U.S.C. § 7117(d)(1). To qualify, the union must hold exclusive recognition for at least 3,500 employees, government-wide. 5 C.F.R. § 2426.11(a)(2).

d. Dues allotment recognition. A union qualifies for dues allotment recognition if it can show that at least 10% of the employees in an appropriate unit for which no union holds exclusive recognition are members of the union. 5 U.S.C. §

7115(c)(1). A union accorded dues allotment recognition can negotiate on only one matter: the withholding of union dues from the pay of the employees who are members of the union. The dues withholding and official time provisions of 5 U.S.C. §§ 7115(a) and 7131(a), applicable only to unions holding exclusive recognition, do not apply to a union with only dues allotment recognition.

e. Exclusive Recognition. The most common type of recognition for the installation labor counselor is that of exclusive representation of a labor organization. The Federal Labor Relations Authority and its General Counsel, through the Regional Director, supervise the process by which labor organizations obtain exclusive representation.

To obtain "exclusive recognition" a labor organization must receive a majority of the valid votes cast in a secret ballot election held among employees in an appropriate unit. A labor organization may "force" the required secret ballot election by filing a petition seeking an election with the appropriate Regional Director. The Regional Director will review the petition to insure that it is timely filed, that there is the requisite showing of interest, and that the bargaining unit is appropriate. If it satisfies the above requirements, the Regional Director will schedule a secret ballot election. The Authority certifies a union if the union receives the requisite number of employee votes.

A union accorded exclusive recognition is entitled to a number of rights and benefits to include: the right to negotiate the conditions of employment of the employees it represents (5 U.S.C. §§ 7114 and 7117); the right to be given an opportunity to be represented at "formal discussions" and "investigatory examinations" (5 U.S.C. § 77114(a)(2)); the right to receive official time to negotiate collective bargaining agreements (5 U.S.C. § 7131(a)); and the right to receive dues allotments at no cost to the union (5 U.S.C. § 7115(a)). The union also has a number of obligations, including a general duty to represent the interests of all bargaining unit employees without regard to union membership (5 U.S.C. § 7114(a)(1).)

2-2. Solicitation of Employees.

A union must receive a majority of the valid votes cast in the representation election before it is certified as the exclusive representative. To obtain this support, it must communicate with the employees. Labor union organizers can communicate with employees off the installation but it is difficult to assemble them off-post and during off-duty hours. They prefer to contact employees at their places of employment. But to allow such may disrupt work. The labor counselor may be expected to advise commanders as to the right of employee and nonemployee union organizers to solicit employees on the installation. The Federal sector has borrowed its solicitation rules from the private sector. The following materials address these rules.

a. Solicitation by nonemployees.

The cases below discuss the rules management may use in restricting nonemployee labor organizers from entry on the installation. These are normally persons paid by the national office. As a general rule, management need not allow professional labor organizers on the activity premises to solicit support. There are exceptions such as when the organizers show they cannot reasonably communicate with the proposed bargaining unit employees on a direct basis outside the activities premises (employee inaccessibility). A second exception is when management decides to allow one union to use its services and facilities. It would then be required to furnish equal services and facilities to other unions that have equivalent status to the first union.

To understand the rules regarding management's obligation to permit unions to solicit members on installation premises, it may be helpful to consider the practice in the private sector. The Supreme Court held that an employer may deny access to his property to nonemployee union organizers, provided (1) the union is reasonably able to communicate with the employers by other means, and (2) the employer's denial does not discriminate against the union by permitting other non-employee solicitors (including other unions) to solicit or distribute literature. NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). The Supreme Court recently reaffirmed the rules set out in Babcock. *See* Lechmere, Inc v. NLRB, 502 U.S. 527 (1992).

In National Treasury Employees Union v. King, 798 F.Supp. 780 (D.D.C. 1992) the National Treasury Employees Union (NTEU) successfully raised a constitutional challenge to the limitation of outside union solicitation in public areas under the control of a federal agency, when that agency has treated the location as a public forum. NTEU requested permission to solicit membership at a Social Security Administrative facility. The agency denied permission on the grounds that allowing such access would be an unlawful assistance of a rival union. This position was supported by the FLRA. Social Security Administration and National Treasury Employees Union and American Federation of Government Employees, 45 FLRA 303 (1992). The D.C. Circuit, however, found this restriction constituted a violation of the First Amendment of the Constitution since the agency had allowed charitable organizations to conduct solicitations at the same spot. By allowing charitable organizations to use the sidewalk, the agency had converted the location into a public forum and could no longer limit the union expression at that location.

In a related case, National Treasury Employees Union v. FLRA, 986 F.2d 537 (D.C. Cir. 1993), the FLRA was directed to consider the constitutional (First Amendment) implications of its statutory analysis. The case also involved NTEU's attempt to solicit members at the Social Security Administration. The FLRA upheld the agency's denial of access on the basis of the statute, 5 U.S.C. § 7116(a)(1) and (3). The FLRA expressly refused to consider the constitutional issues when interpreting the statute. The court remanded the case to the FLRA for reconsideration of the statutory provisions in light of the constitutional issues raised. The FLRA in turn remanded to the Regional Director to develop the factual record. Social Security Administration and

NTEU, 47 FLRA 1376 (1993). NTEU then requested reconsideration of the remand, which was denied. SSA and NTEU, 48 FLRA 539 (1993).

Based upon this series of decisions, the Authority, in 1997, revised its framework for determining how to apply the rules concerning nonemployee organizers' access to federal premises. Social Security Administration and NTEU and AFGE, 52 FLRA 1159 (1997), aff'd in part and remanded in part sub nom., NTEU v. FLRA, 139 F.3d 214 (D.C. Cir. 1998). Under the new approach, the agency must first determine whether its action of denying or authorizing access sponsors, controls, or assists a labor organization by failing to maintain an arms-length relationship with the union involved in violation of 5 U.S.C. § 7116(a)(3). In addition the agency must consider the relationship between 5 U.S.C. § 7116(a)(3) and 5 U.S.C. § 7116(a)(1), which has been interpreted as requiring the agency to consider the availability of other means of communication and to maintain a nondiscrimination policy between unions. So, even if a rival union has not obtained equivalent status, the agency will be obligated to grant access when to do otherwise would violate 5 U.S.C. § 7116(a)(1) because other means of communication are not available. In NTEU v. FLRA, 139 F.3d 214 (D.C. Cir. 1998), the D.C. Circuit held that the FLRA's reliance on the Babcock framework was appropriate in deciding whether a violation of 5 U.S.C.§7116(a)(1) had occurred. The court, however, disagreed with the FLRA's application of Babcock, and held that the SSA had violated 5 U.S.C. § 7116(a)(1).[1] Id. at 219. On remand, the Authority applied Babcock and found that the SSA violated 5 U.S.C. § 7116(a)(1) in denying NTEU access to the SSA's premises. SSA and NTEU, 55 FLRA No. 158 (1999).

The two cases excerpted below will discuss the above points. The first case deals with the exception for organizers who cannot reasonably communicate with the proposed bargaining unit employees. Management frequently violates the statute by failing to hold the outside organizers to the high standard of proof required by the case law.

The second case deals with the question of when a challenging labor organization obtains equivalent status. Again, management must be careful in determining when a union is entitled to equivalent status. Both cases reinforce a point (discussed later) that management must remain neutral during the process of selecting employee representatives.

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[1] In ruling in favor of the SSA, the FLRA had relied on an exception to the Babcock rule for "isolated beneficent acts," which allowed an employer to maintain a "no-solicitation rule" while granting access to a few charitable organizations. Because the SSA did not have a no-solicitation rule, the court held that the "isolated beneficent acts" exception did not apply. Id. at 218.

BARKSDALE AIR FORCE BASE and
NATIONAL FEDERATION OF FEDERAL EMPLOYEES LOCAL 1953

45 FLRA 659 (1992)

(Extract)

Facts

This unfair labor practice case is before the Authority in accordance with section 2429.1(a) of the Authority's Rules and Regulations based on a stipulation of facts by the parties, who have agreed that no material issue of fact exists. The General Counsel and the Respondent filed briefs with the Authority.

The complaint alleges that the Respondent violated section 7116(a)(1) and (3) of the Federal Service Labor-Management Relations Statute (the Statute) by permitting a non-employee organizer of the American Federation of Government Employees (AFGE) access to its facilities for the purpose of organizing a campaign to represent its employees at a time when those employees were represented by the Charging Party.

The Respondent is an Air Force base in Louisiana. The Charging Party, National Federation of Federal Employees, Local 1953 (NFFE), is the exclusive bargaining representative for a unit of the Respondent's professional and non-professional civilian employees who are paid from appropriated funds. At all times material to this case, NFFE and the Respondent were parties to a collective bargaining agreement that expired on April 13, 1991.

On December 11, 1990, the National Organizer for AFGE sent a letter to the Commander of the base, stating in part as follows:

> By way of this letter, [AFGE] is requesting access to the employees of Barksdale Air Force Base. The purpose of this request is for representational recognition.
>
> It is understood that non-recognized labor organizations must first demonstrate that the targeted unit employees are inaccessible to alternate means of communication, as we do not have the home phone and mailing addresses to these employees our communication has been ineffective, therefore, we are requesting your permission to contact the employees at their work site.

> The campaigning activities would be restricted to the entrance and/or exit of the employees['] work areas and would not in any way interfere with their job.
>
> We would also like to request a roster containing the breakdown on the number of employees and the location in which they work. The period for which this request is made, to begin, December 17, 1990 through March 1991.

By letter dated December 17, 1990, the Respondent responded to the request, stating in part:

> Normally, non-employee representatives of unions that do not have exclusive representative status for agency employees have no right of access to the agency premises to campaign; however, you have provided sufficient justification that will allow your permission. Therefore your request . . . is approved.

From December 17, 1990, through March 31, 1991, a nonemployee organizer for AFGE had access to the base for the purpose of organizing for representational recognition by AFGE. At that time, no petition for representation had been filed with the Authority by AFGE, but the Respondent was unaware of this fact.

The parties stipulated that at a hearing the Respondent would have produced testimony to show that during the period from August 1990 to April 1991, the base was under a heightened state of security due to the Desert Shield and Desert Storm actions and that the base was under a threat of anti-terrorist[sic] activity against its installations and personnel. According to the stipulation, the Respondent would have argued that the base is not an open base even during normal times; that during this period the AFGE organizers would not have been allowed to campaign directly outside the gate due to security reasons; that one bargaining unit employee was engaged in campaigning for AFGE, but that management would not have provided that employee, AFGE, or the incumbent Union with the names and home addresses of unit employees; and that, therefore, the bargaining unit employees were essentially inaccessible to AFGE. Accordingly, the Respondent would have argued that it permitted the nonemployee on the base to conduct an organizing campaign on behalf of AFGE in accordance with the Department of Defense Civilian Personnel Manual.

Where the employees involved are covered by exclusive recognition, permission will not be granted for on-station organizing or campaigning activities by nonemployee representatives of labor organizations other than the incumbent exclusive union except where (1) a valid question concerning representation has been raised with respect to the employees involved, or

(2) the employees involved are inaccessible to reasonable attempts by a labor organization other than the incumbent to communicate with them outside the activity's premises.

In January 1991, the Respondent and the Union began negotiations for a new collective bargaining agreement covering the unit employees, which was effective from May 8, 1991, to May 8, 1994.

Positions of the Parties

The Respondent

The Respondent concedes that an agency violates the Statute if it provides a labor organization with services or the use of its facilities at a time when that union does not have equivalent status with the exclusive representative of the agency's employees. The Respondent argues, however, that the situation in this case falls within the exception to that rule, which was articulated in Department of the Army, U.S. Army Natick Laboratories, Natick, Massachusetts, 3 A/SMLR 193 (1973) (Natick).

The Respondent contends that, under Natick, it lawfully granted access to the AFGE organizer because it is required under paragraph 3.5 of the Civilian Personnel Manual to allow a rival union some means of communicating with employees if the rival union makes a diligent effort to contact employees and fails to do so because the employees are inaccessible. The Respondent argues that in the circumstances of this case, AFGE had no reasonable alternative means of communication with the employees. It notes that AFGE does not have the home telephone or mailing addresses of the employees and that the Respondent "is prohibited from releasing these under a series of Circuit Court decisions." Respondent's Brief at 9. It also describes the situation on the base during the military operations of Desert Shield and Desert Storm, when it "was under a heightened state of security" and "an anti-terrorist threat condition." Id. It argues that under Authority precedent it may "reasonably control . . . unions which are involved in elections campaigns from creating internal security risks to agency personnel or equipment[.]" Id. at 10. It asserts, therefore, that it properly allowed the organizer to solicit on base, adding that it was totally unaware that AFGE had failed to file a petition for representation with the Authority.

B. General Counsel

The General Counsel points to the fact that AFGE never obtained equivalent status with the incumbent Union, and argues that, as there were no extraordinary circumstances that prevented AFGE from reaching the Respondent's employees through other means, the Respondent violated

section 7116(a)(3) by allowing AFGE access to the base to conduct its organizing campaign.

The General Counsel disputes the Respondent's defense that AFGE had no alternative means of reaching the employees....

The General Counsel also argues that in the Respondent's letter granting access to AFGE, the Respondent made no mention of any constraints resulting from the military operations or any heightened security. The General Counsel suggests that the use of such a defense at this point is "merely an attempt to justify actions that cannot be justified."

Finally, the General Counsel argues that the Civilian Personnel Manual cannot sanction the Respondent's failure to follow the Statute because the Respondent summarily granted AFGE access without determining whether AFGE had in fact made a diligent effort to contact the employees, as required by the Manual.

Analysis and Conclusions

Under section 7116(a)(3) of the Statute, an agency unlawfully assists a labor organization when it grants a rival union without equivalent status access to its facilities for the purpose of organizing its employees. See, for example, Gallup Indian Medical Center 44 FLRA 217 (1992). As an exception to this rule the Authority has held that a union lacking equivalent status "'may obtain access to an agency's facilities if it demonstrates to the agency that, after diligent effort, it has been unable to reach the agency's employees through reasonable, alternative means of communication.'" Social Security Administration, 45 FLRA 303 at 318 (1992) (quoting American Federation of Government Employees v. FLRA, 793 F.2d 333, 337 n.9 (D.C. Cir. 1986)).

This exception was first applied in Natick by the Assistant Secretary of Labor for Labor-Management Relations (Assistant Secretary) under Executive Order 11491, the predecessor to the Statute. Natick involved a facility that was guarded and enclosed by a high fence. Although the evidence established that the employees were difficult to reach entering and exiting the facility, the Assistant Secretary concluded that nonemployee organizers for a rival union that did not have equivalent status could not gain access outside its premises. In reaching this conclusion, the Assistant Secretary examined whether the rival union had "made a diligent, but unsuccessful, effort to contact the employees away from the [employer's] premises and [whether] its failure to communicate with the employees was based on their inaccessibility." 3 A/SLMR at 196. Finding insufficient evidence of inaccessibility under this analysis, the Assistant Secretary found that the agency had violated the Executive Order by permitting access to its premises to nonemployee organizers for the rival union . . ..

In this case there is no evidence that the Respondent inquired as to the measures taken by AFGE to contact the employees on the Respondent's premises without using nonemployee organizers to do so. Significantly, there is evidence that one employee already is engaged in campaigning for AFGE. It is established Authority law that the Respondent may not interfere with that employee's right to distribute materials for AFGE on its premises if the distribution takes place in non-work areas during non-work times. (cite omitted) Nonetheless, there is no evidence that the Respondent took into account that employee's efforts on behalf of AFGE when determining that its employees were inaccessible to AFGE's organizing campaign.

Moreover, there is no evidence whatsoever to indicate whether the Respondent attempted to ascertain measures taken by AFGE to contact the employees off the base other than AFGE's unsuccessful attempt to obtain the home telephone numbers and addresses of the employees. For example, the Respondent did not inquire as to whether AFGE had made any effort to reach the employees through the media or by distributing leaflets on or near public transportation or in popular gathering spots, such as malls where employees are known to congregate. In the absence of such information regarding AFGE's organizational efforts, the Respondent had no basis on which to grant access to a labor organization without equivalent status. In this regard, the Respondent appears to defend its decision to grant access to AFGE by stating only that it is unable to furnish the incumbent Union with the addresses of its employees, and, therefore, that it could not provide that information to any other union. As we have shown above, contact with employees at their homes is not the only way by which a rival union can attempt to communicate with employees away from the workplace. Whether the Respondent fulfills its obligations under the Statute with regard to the incumbent Union should have no bearing on the rights of a rival union to organize on the Respondent's premises.

Finally, we conclude that it is not relevant to the disposition of this case that the Respondent assertedly did not know that AFGE had not filed a petition for an election when the Respondent permitted the AFGE organizer access to the base. An agency has a statutory obligation under section 7116(a)(3) to ensure that it does not provide unlawful assistance to a union without equivalent status. Therefore, before granting access to its employees and facilities to nonemployee organizers for a rival union, the agency is obligated to determine whether that union has achieved equivalent status and, if it has not, whether its failure to communicate with the employees was based on their inaccessibility. If an agency does not make such inquiries, it acts at its peril.

Accordingly, we conclude that the Respondent violated section 7116(a)(3) of the Statute by granting access to its premises to a

nonemployee organizer for AFGE at a time when AFGE did not have equivalent status with the incumbent union and had not established that its failure to communicate with the Respondent's employees was based on their inaccessibility.

Order

{The Air Force was ordered to cease and desist from providing assistance to AFGE when it did not have equivalent status and to post a notice provided by the Authority.}

The Supreme Court ruled that release of home addresses and telephone numbers of federal employees, in a bargaining unit, to a union violates the Privacy Act. DOD v. FLRA, 510 U.S. 487 (1994).

U.S. DEPARTMENT OF DEFENSE
DEPENDENTS SCHOOL PANAMA REGION
44 FLRA 419 (1992)

(Extract)

This case is before the Authority on an application for review filed by the Panama Canal Federation of Teachers, Local 29 (PCFT) pursuant to section 2422.17(a) of the Authority's Rules and Regulations. The Education Association of Panama (EAP) filed an opposition to the application for review.

The Regional Director conducted an election in a unit of Activity employees in which PCFT was the certified exclusive representative. A majority of the valid votes counted was cast for PCFT. Timely objections to the election were filed by EAP.

In her Decision and Order on Objections to Election, the Acting Regional Director (ARD) set aside the election and directed that another be conducted on the ground that the Activity had improperly denied EAP access to certain Activity facilities and services. PCFT seeks review of the ARD's decision on this issue.

For the following reasons, we grant the application for review because we find that a substantial question of law and/or policy is raised because of an absence of Authority precedent on the issue involved in this case and, for reasons which differ in part from those of the ARD, we will set aside the election.

Background

On January 3, 1991, EAP filed a petition seeking an election in a unit of employees represented by PCFT. By letter to the Activity dated January 28, 1991, EAP asserted that it had achieved "equivalent status" with PCFT and, as a result, was entitled to "equivalent bulletin board space at each school and the right to use the internal mail system." Letter of January 28, 1991. EAP renewed its requests for access to the bulletin board space and internal mail system by letters dated February 1 and February 7, 1991. The Activity refused the requests and asserted, among other things, that granting EAP access to the disputed facilities and services at that time would constitute an unfair labor practice under section 7116(a)(3) of the Statute.

By letter dated February 6, 1991, the Authority's Regional Office directed the Activity to post a notice of the petition. After examining a list of unit employees provided by the Activity and comparing EAP's showing of interest to that list, the Regional Office determined, on March 12, 1991, that the showing of interest was adequate and so notified the Activity. On that date, the Activity granted EAP's request for access to the requested facilities and services. Pursuant to the parties' agreement, a representation election was held on May 9, 1991. A majority of the valid votes counted was cast for PCFT. EAP then filed objections to the election.

Acting Regional Director's Decision

Before the ARD, EAP contended, as relevant here, that it achieved equivalent status with PCFT on January 3, 1991, the date on which it filed the representation petition. Accordingly, EAP argued that, as of that date, it should have been granted access to bulletin boards in various locations as well as the Activity's internal mail system.

The ARD agreed with EAP. [T]he ARD determined that "[a] labor organization acquires equivalent status when it has raised a question concerning representation by filing a representation petition or becoming an intervenor in such a pending representation petition." (cites omitted). [T]he ARD further determined that "EAP acquired equivalent status when it filed the petition and was thereafter entitled under [s]ection 7116(a)(3) of the Statute to the same and customary and routine services and facilities that DoDDS had granted to the incumbent Union, PCFT." (Cites omitted). Based on these findings, the ARD sustained EAP's objection to the election and directed that the election be set aside and another be conducted.

* * *

Analysis and Conclusions

* * *

PCFT argues that its application for review should be granted because the ARD's decision departs from Authority precedent. We disagree and conclude, instead, that there is an absence of Authority precedent on the issue of when a petitioning union acquires equivalent status, within the meaning of section 7116(a)(3) of the Statute, so as to be entitled to be furnished customary and routine facilities and services.

* * *

In none of these cases did the Authority address the issue of when a petitioning union acquires equivalent status. Accordingly, as no case in which such issue was addressed has been cited or is apparent to us, we conclude that there is an absence of Authority precedent on this issue and we grant PCFT's application for review.

We note that although section 7116(a)(3) of the Statute refers to "labor organizations having equivalent status[,]" and although the legislative history of the Statute contains an example of equivalent status, the Statute does not define that term. Consistent with the plain wording of section 7116(a)(3), our task is to determine when, for the purposes of that section, two or more unions have the same status under the Statute. In the case before us, one of those unions is an incumbent exclusive representative. Accordingly, the question is when, or how, a petitioning union acquires a status which is equivalent to that of an incumbent for the purposes of section 7116(a)(3) of the Statute.

Section 7111 of the Statute sets forth the process by which unions are certified as exclusive representatives. As relevant here, under that section, a union seeking exclusive recognition must file with the Authority a petition alleging that 30 percent of the employees in an appropriate unit wish to be represented by the union. Section 7111(f) provides that exclusive recognition may not be accorded a union if, among other things, there is not credible evidence that at least 30 percent of the employees in the relevant unit wish to be represented by the union.

Section 7111(b) provides that the Authority shall investigate a representation petition and, if there is reasonable cause to believe that a question concerning representation exists, shall provide an opportunity for a hearing or supervise and conduct an election. In conducting such investigation, the appropriate Regional Director determines, among other things, the adequacy of a showing of interest. 5 C.F.R. § 2422.2.(f)(1). After the Regional Director determines that a petition establishes a prima facie showing of interest, the Regional Director so notifies the affected activity and requests the activity to post copies of a notice of petition in certain places and furnish the Regional Director a current list of employees included in or excluded from the unit described in the petition. 5 C.F.R. §

2422.4 . . .. A party may challenge the validity of a showing of interest and/or may intervene by filing its challenge or intervention with the Regional Director within 10 days after the posting. 5 C.F.R. § 2422.2(f)(2).

It is clear from the foregoing that certain statutory and regulatory requirements are applicable to representation petitions. It is clear also that such petitions must be investigated to determine whether the requirements have been satisfied. As such, we are not persuaded that the mere filing of a representation petition automatically confers on the filing party a status equivalent to that of an incumbent. Instead, we conclude that a petitioning union acquires equivalent status for the purposes of section 7116(a)(3) when an appropriate Regional Director determines, and notifies the parties, that the petition includes a prima facie showing of interest and merits further processing. Therefore, consistent with the Authority's Rules and Regulations, we conclude that a petitioning union acquires equivalent status with an incumbent at such time as the Regional Director determines, and notifies the appropriate parties, that a notice of the petition will be posted.

In our view, this approach protects the rights of all parties. It protects the rights of an incumbent union by assuring that a petitioning union will not have access to an agency's facilities and services for campaign purposes based on a facially invalid petition or showing of interest. We note that, consistent with section 205.025 of the General Counsel Case Handling Manual, "[a]ll authorization material must be checked completely in determining the existence of a prima facie showing of interest." As such, this approach would not, as alleged by PCFT with respect to the principle applied by the ARD, "encourage labor organizations to file frivolous representation petitions without an adequate showing of interest in the hope of gaining equivalent status and organizing at the expense of incumbent labor organizations." Application for Review at 8. At the same time, this approach assures a petitioning union that it will be furnished with customary and routine facilities and services at the same time - when notices are posted - that unit employees are made aware of a petition and are, therefore, likely also to be aware of the relative status of a petitioner and an incumbent. Finally, this approach enables agencies and activities easily to determine whether a labor organization is entitled, on request, to be furnished facilities and services under section 7116(a)(3) of the Statute.

* * *

In this case . . . it is not clear precisely when the parties received the notification or otherwise were made aware by the Regional Office that EAP's petition was facially sufficient and the notices would be posted. We find it unnecessary to determine that date, however, because it is clear that the notification and the parties' receipt of it substantially preceded March 12, 1991, the date on which EAP was granted access to the disputed facilities and services. Therefore, in agreement with the ARD's conclusion

but for reasons which differ from the ARD, we find that EAP's objection to the election has merit. Accordingly, we sustain the ARD's decision to set aside the election and direct that another election be conducted in accordance with the Authority's Rules and Regulations.

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b. Solicitation by Employees.

Employees who work on the installation are treated differently from non-employee organizers. They may not be excluded from the installation as the nonemployee may be. However, they may be restricted in their activities. Generally, management may limit oral communications between employees to non-duty time and the distribution of literature to non-duty time and non-work areas. In addition, solicitation cannot interfere with work. The following decision discusses the restrictions that may be imposed.

**OKLAHOMA CITY AIR LOGISTICS CENTER (AFLC)
TINKER AIR FORCE BASE, OKLAHOMA and AFGE
6 FLRA 159 (1981)**

(Extract)

* * *

Pursuant to section 2423.29 of the Authority's Rules and Regulations (5 C.F.R. § 2423.29) and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Recommended Decision and Order and the entire record, the Authority hereby adopts the Judge's findings, conclusions and recommendations including his recommended order, except for those portions of the Recommended Decision and Order specifically discussed herein.

* * *

At the hearing, the complaint was amended at the request of the General Counsel to include an allegation that Respondent maintained a no-solicitation rule that prohibited all paid-time solicitation in violation of section 7116(a)(1) of the Statute. Specifically, the General Counsel argued that

Respondent's prohibition of solicitation during an employee's free or nonduty time, albeit paid-time, was violative of the Statute. The Respondent concedes that such a rule was maintained and that the prohibition of solicitation was extended to include employees' paid break and lunch periods. Moreover, probationary employee Beasley was admonished for his break-time solicitation activities; indeed, his alleged improper solicitation was given by the Activity as a reason for his termination.

The Judge found that the Respondent's maintenance of the rule prohibiting solicitation of membership by the Union during all paid breaks and its discipline of probationary employee Beasley for violation of this rule constituted violations of section 7116(a)(1) of the Statute. In so finding, the Judge noted the basic difference between duty time (clock time) and working time, and noted further that no-solicitation rules which seek to prohibit solicitation during all duty time violate the rights of employees.

The Authority adopts the Judge's conclusion in this regard. We note that the Respondent has granted designated rest breaks and paid lunch breaks pursuant to Department of Air Force Regulation 40-610 and that section 7131(b) of the Statute requires that 'solicitation of membership . . . be performed during the time the employee is in a nonduty status.' However where, as here, it has been determined that employees, at the discretion of management, have been assigned periods of time during which the performance of job functions is not required (i.e., paid free time), the Authority finds that such time falls within the meaning of the term 'nonduty status' as used in section 7131(b). Thus, solicitation of membership during such time is permissible. Accordingly, as concluded by the Judge, the Respondent's conduct in maintaining a rule prohibiting solicitation of membership during such breaks and in disciplining employee Beasley for violation such an unlawful rule, violated the Statute . . . .

In a series of cases involving a census employee named Hanlon, the Authority outlined the rules concerning solicitation in the work place by employees. In Department of Commerce, Bureau of Census and Edward Hanlon, 26 FLRA 311 (1986), the authority summarized the existing rules:

The FLRA has held that employees have a right, protected by Section 7102 of the Statute, to solicit membership and distribute literature on behalf of labor organizations during non-work time in non-work areas. (Cites omitted). The FLRA has further held that an employee has the right to solicit membership on behalf of a labor organization while in non-duty status in work areas where the employees being solicited are also in non-duty status, absent disruption of the activity's operations. (Cites omitted) . . . . [A]n agency policy or rule prohibiting solicitation by employees, on work premises, during non-duty time is presumptively invalid (citing Tinker).

The Authority then found it to be an unfair labor practice for the Bureau of Census to prohibit employees from soliciting membership in a labor organization during non-work time in work areas where there is no disruption of work.

In General Services Administration and Edward Hanlon, 26 FLRA 719 (1987), The Authority found an unfair labor practice in the GSA's refusal to allow Hanlon to show a film or video, during non-work times in non-work areas of the federal building, including the lobby. In GSA and Edward Hanlon, *et. al.*, 29 FLRA 684 (1987), the Authority found unfair labor practices in the agency's attempt to limit the times Hanlon could use the lobby and to limit the content of the union materials. The materials included information on commercial products available to union members. (There are numerous other decisions in which Mr. Hanlon is a named party. The most recent appears at 41 FLRA 436 (1991).)

2-3. The Representation Petition.

NOTE: In 1996, the FLRA amended its rules relating to Representation Proceedings. The new rules provide for one type of petition where the party describes the purpose for the petition. Previously, the FLRA had numerous types of petitions, each with a single function. These new rules, amending 5 C.F.R. parts 2421, 2422 and 2429, were effective 15 March 1996.

a. Petition Seeking Election.

A union that desires a secret ballot election to determine whether employees desire it as their exclusive representative files a petition with the Regional Office of the Authority. Instructions relating to the filing of petitions are in 5 C.F.R. §2422.

b. Showing of Interest.

The petition must be accompanied by a 30% showing of interest. 5 U.S.C. § 7111(b)(1) and 5 C.F.R. § 2422.3. The "showing of interest" is a list of employees who have indicated they support a particular labor organization's request for an election. Such indication may be in many different forms, such as: evidence of membership in a labor organization; employees' signed authorization cards or petitions authorizing a labor organization to represent them for purposes of exclusive recognition; unaltered allotment of dues forms executed by the employee and the labor organization's authorized official; current dues records; an existing or recently expired agreement; current exclusive recognition or certification. The original representation petition "showing of interest" list must number at least 30 percent of the eligible employees in the proposed bargaining unit. Those on the list are not necessarily union members nor are they required to vote for the union. They only need to have indicated they would support the union's request for an election.

Section 7111(b) provides:

(b) If a petition is filed with the Authority--

(1) by any person alleging--

(A) in the case of an appropriate unit for which there is no exclusive representative, that 30 percent of the employees in the appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative . . . .

the Authority shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing (for which a transcript shall be kept) after reasonable notice. If the Authority finds on the record of the hearing that a question of representation exists, the Authority shall supervise or conduct an election on the question by secret ballot. . . .

In North Carolina Army National Guard, Raleigh, North Carolina and Association of Civilian Technicians, 34 FLRA 377 (1990), the Authority spelled out the extent to which it will review a Regional Director's ruling regarding the sufficiency of the showing of interest. A Regional Director's determination of the adequacy of the showing of interest is administrative in nature and is not subject to collateral attack at a unit or representation hearing. 5 C.F.R. § 2422.[9]. However, if a Regional Director dismisses a petition based on an insufficient showing of interest, an application for review may be filed with the Authority in accordance with procedures set forth in section 2422.[31]. *Id*. *See also,* U.S. Coast Guard Finance Center, 34 FLRA 946 (1990).

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c. Timeliness.

The original petitioner and subsequent intervenors must file their petitions within certain time limits or the Regional Director will dismiss the petitions (FSLMRS § 7111 (f)). These time limit rules are known as the "election bar," the "certification bar," and the "contract or agreement bar."

(1) Election Bar.

FSLMRS § 7111(b). "If a petition is filed with the Authority . . . (A) in the case of an appropriate unit for which there is no exclusive representative, . . . an election under this subsection shall not be conducted in any appropriate unit or in any subdivision thereof within which in the preceding 12 calendar months a valid election under the subsection has been held."

> 5 C.F.R. § 2422.12(a) Election Bar. "Where there is no certified exclusive representative, a petition seeking an election will not be considered timely if filed within twelve (12) months of a valid election involving the same unit or a subdivision of the same unit."

A petition will be dismissed if the unit petitioned for is a subdivision of a unit in which an election had been held within the preceding 12 months. However it will be accepted if the petitioned for unit contains a smaller unit which had an election within the previous 12 months.

(2) Certification Bar.

> FSLMRS § 7111(f)(4). Exclusive recognition shall not be accorded ". . . if the Authority has, within the previous 12 calendar months, conducted a secret ballot election for the unit described in any petition under this section and in such election a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative."

> 5 C.F.R. § 2422.12(b). "Where there is a certified exclusive representative of employees, a petition seeking an election will not be considered timely if filed within twelve (12) months after the certification . . . ."

The Regional Director will not hold a representation election if a union was certified as the exclusive representative within the last twelve (12) months. The rationale for the certification bar is "to afford an agency or activity and a certified incumbent labor organization a reasonable period of time in which to initiate and develop their bargaining relationship free of rival claims." Department of the Army, U.S. Army Engineer District, Mobile, Ala., A/SLMR No. 206 (Sept. 27, 1972).

A signed collective bargaining agreement ends application of this bar and triggers the contract or agreement bar provisions discussed below.

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(3) Agreement Bar.

A valid contract covering part of the employees in the proposed unit bars a petition filed by another union. The statute provides:

> 5 U.S.C. § 7111(f)(3) if there is then in effect a lawful written collective bargaining agreement between the agency involved and an exclusive representative (other than the labor organization

seeking exclusive recognition) covering any employees included in the unit specified in the petition, unless--

(A) the collective bargaining agreement has been in effect for more than 3 years, or

(B) the petition for exclusive recognition is filed not more than 105 days and not less than 60 days before the expiration date of the collective bargaining agreement;"

5 C.F.R. § 2422.12(c) Bar during . . . agency head review. A petition seeking an election will not be considered timely if filed during the period of agency head review under 5 U.S.C. § 7114(c). This bar expires upon either the passage of thirty (30) days absent agency head action, or upon the date of any timely agency head action.

5 C.F.R. § 2422.12(d) Contract bar where the contract is for three (3) years or less. Where a collective bargaining agreement is in effect covering the claimed unit and has a term of three (3) years or less from the date it becomes effective, a petition seeking an election will be considered timely if filed not more than one hundred and five (105) and not less than sixty (60) days prior to the expiration of the agreement.

5 C.F.R. § 2422.12(e) Contract bar where the contract is for more than three (3) years. Where a collective bargaining agreement is in effect covering the claimed unit and has a term of more than three (3) years from the date it became effective, a petition seeking an election will be considered timely if filed not more than one hundred and five (105) and not less than sixty (60) days prior to the expiration of the initial three (3) year period, and any time after the expiration of the initial three (3) year period.

In North Carolina Army National Guard, Raleigh, North Carolina and Association of Civilian Technicians, 34 FLRA 377 (1990) the FLRA discussed the requirements for filing representation petitions and the time for submitting the petition. The Authority held that the appropriate Regional Director must receive a petition for certification of representative during the open period. The petition must be accompanied by an adequate showing of interest. When authorization cards are submitted as evidence of a showing of interest, the cards must be signed and dated. 5 C.F.R. § 2421.16.

The Authority also discussed the timing of additional showings of interest when there is a dispute as to the number of employees in the proposed bargaining unit. The Union may file an additional showing of interest once the unit size is determined. However, this additional showing of interest must have been signed and dated before the expiration of the open period.

A petition may be filed during the window period before the termination date or the automatic renewal date. If a contract has been extended prior to sixty (60) before the termination or automatic renewal date, the extension or renewal does not bar a petition filed during the window period. 5 C.F.R. § 2422.13(g).

Similarly, an agreement between the parties to extend the terms of the collective bargaining agreement during renegotiations does not bar a petition. Army National Guard, Camp Keyes, Augusta, Maine, 34 FLRA 59 (1989) citing, Department of the Army, Corpus Christi Army Depot, 16 FLRA 281 (1984).

The sixty day period prior to the termination date or automatic renewal date is the insulated period and is intended to protect the incumbent union from raiding unions and to stabilize bargaining relationships.

If a contract is of more than three years duration and has a definite termination or automatic renewal date, it bars an election only for the first three years. If there is no termination or automatic renewal date, the contract does not bar a petition anytime.

There are a variety of issues associated with the application of an agreement bar. Several issues are discussed below.

1. For purposes of the agreement bar, a negotiated agreement must contain a clear and unambiguous effective date and language setting forth its duration. 5 C.F.R. § 2422.12(h). Watervliet Arsenal v. NFFE, 34 FLRA 98 (1989); U.S. Army Recruiting Command, Concord N. H. and AFGE, 14 FLRA 73 (1984). In U.S. Department of the Interior, Redwood National Park, 48 FLRA 666 (1993) the Authority held that a smudge or extra mark on reproduced copies of the collective bargaining agreement could render the effective date ambiguous and prevent the agreement from acting as a bar.

2. An agreement that goes into effect automatically and that does not contain the date on which the agreement becomes effective does not constitute a bar to an election petition. 5 C.F.R. § 2422.12(h). *See* Watervliet Arsenal.

3. In determining the open period, the effective date rather than its execution date is used. IRS, North Atlantic Service Center, 3 FLRA 385 (1980).

4. For an agreement subject to automatic renewal the Authority held that a request to negotiate modifications in an existing agreement serves to prevent the automatic renewal. Office of the Secretary, Headquarters, Department of Health and Human Services, 11 FLRA 681 (1983).

5. Settlement of an ULP charge that required the parties to reopen the existing collective bargaining agreement did not remove the collective bargaining agreement as a bar. The settlement agreement expressly provided that the present agreement shall be extended in its entirety until a new agreement is reached and

approved. *See,* Department of Housing and Urban Development, Newark Office, 37 FLRA 1122 (1990).

2-4. Posting of Notice. [5 C.F.R. § 2422.7].

a. After a petition has been filed, the Regional Director will furnish the activity with copies of notices which must be posted where employee notices are normally posted. The notice contains information as to the name of the petitioner and a description of the unit involved. The unit description will specify both included and excluded personnel.

b. The notice not only advises the employees that an election petition has been filed, but also puts potential union intervenors on notice that they have an opportunity to intervene in the election.

2-5. Intervention [FSLMRS § 7111(c) and 5 C.F.R. § 2422.8].

> 5 U.S.C. § 7111(c) "A labor organization which--
>
> (1) has been designated by at least 10 percent of the employees in the unit specified in any petition filed pursuant to subsection (b) of this section (10% showing of interest);
>
> (2) has submitted a valid copy of a current or recently expired collective bargaining agreement for the unit; or
>
> (3) has submitted other evidence that it is the exclusive representative of the employees involved;
>
> may intervene with respect to a petition filed pursuant to subsection (b) of this section and shall be placed on the ballot of any election under such subsection (b) with respect to the petition."

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5 C.F.R. § 2422.8(d) provides that "An incumbent exclusive representative . . . will be considered a party in any representation proceeding raising issues that affect employees the incumbent represents, unless it serves the Regional Director with a written disclaimer of any representation interest for the claimed unit." For a discussion of disclaimers, *see*, HHS and AFGE and NTEU, 11 FLRA 681 (1983). The effect of the incumbent union's rejecting its intervention rights is to be placed in a lower status than the petitioner union. It will not be on the ballot and may not be given as many opportunities to solicit employees to reject the petitioner union.

2-6. Consent to Elections. 5 C.F.R. § 2422.16.

After the notice is posted and the 10 day period for a union to intervene has expired, the parties will meet and attempt to agree on the conduct of the election. They will attempt to agree to a mutually satisfactory date, place, and time of the election. It is policy to hold the election at the worksite so that it will be convenient for employees to vote and there will be a minimum of disruption to work. They will also attempt to agree upon the designations on the ballot, the use and number of observers, provisions for notice posting, custody of the ballot box, the time and place for counting ballots, and the rules for electioneering. The Regional Director will unilaterally resolve those matters to which the parties cannot agree.

In addition to agreeing to the conduct of the elections, many installations will negotiate campaign ground rules with the petitioning union(s). They will address where, when, and how the union may campaign on the installation. For instance, they may allow bulletin board space for union memoranda, use of the distribution system, conference rooms for union speakers, prohibition of solicitation during duty time, and whatever other rules the parties feel should be enunciated in writing.

The Authority discussed pre-election ground rules in Fort Campbell Dependent School, 46 FLRA 219 (1992). The issue concerned the enforcement of an agreement between the parties that was contained in an agency prepared memorandum of phone calls which the union refused to sign. The Authority indicated that unsigned agreements may be enforceable. However, it had no trouble finding that the parties in this case had not reached an agreement.

2-7. Bargaining Unit Determination.

a. Introduction. One area which frequently creates controversy concerns which employees should be represented by the union, i.e., what is an appropriate bargaining unit.

A bargaining unit is a group of employees with certain common interests who are represented by a labor union in their dealings with management. It is the group of employees the union desires to represent. Typically, the union will propose a bargaining unit and management will agree or disagree with it. If there is disagreement, the Authority will make the final determination as to what is appropriate; with or without a hearing. The Authority may also disapprove a bargaining unit that the parties have agreed to.

> 5 U.S.C. § 7112. "Determination of appropriate units for labor organization representation.
>
> (a) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this

chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of, the agency involved."

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b. General Criteria. The criteria for determining whether a grouping of employees constitutes an appropriate unit are the same as they were under EO 11491: the unit must (1) ensure a clear and identifiable community of interest among the employees in the unit, and (2) will promote effective dealings with, and efficiency of the operations of the agency involved. 5 U.S.C. § 7112(a).

The statutory criteria (community of interest, promoting effective dealings, and efficiency of operations) are, theoretically, given equal weight in analyzing the appropriateness of the unit. Effective dealing and efficiency of operations are generally considered together. The Authority examines the totality of the circumstances in each case in making appropriate unit determinations under section 7112(a)(1) of the Statute. *See* U.S. DoD, Nat'l Guard Bureau and Association of Civilian Technicians, 55 FLRA No. 115 (1999) (concluding that a proposed consolidation of existing bargaining units in 39 states and representing about 53% of eligible National Guard technicians nationwide was not appropriate); Naval Fleet and Industrial Supply Center, Norfolk and AFGE Local 53, 52 FLRA 950 (1997) (finding that bargaining unit employees who transferred to a new installation had accreted to existing units at the new location); DOJ, Office of the Chief Immigration Judge, Chicago, and AFGE, 48 FLRA 620, (1993); Office of Personnel Management, Atlanta Regional Office and AFGE, 48 FLRA 1228, 1233 (1993).

Community of Interest. The Authority has not specified individual factors or the number of factors required to determine that employees share a community of interest. Health and Human Services, Region II, and NTEU, 43 FLRA 1245 (1992). Among the factors considered when determining if a community of interest exists are: the work performed, skills, training and education of the employees, geographic proximity of work sites, relationship of the work, common supervisors, organizational relationships, common applicability of personal practices and working conditions, and bargaining histories. *See* Redstone Arsenal, Alabama and AFGE, 14 FLRA 150 (1984). *See also*, DOJ, Office of the Chief Immigration Judge, Chicago, 48 FLRA 620 (1993).

Effective Dealings With the Agency. Among the factors considered when determining whether or not a given unit will promote effective dealings are: the level at which negotiations will take place, at what point grievances will be processed, whether substantial authority exists at the level of the unit sought, and bargaining history. *See* DOJ, Office of the Chief Immigration Judge, Chicago, 48 FLRA at 637; Defense Logistics Agency, Defense Plant Representative Office-Thiokol, and NFFE, 41 FLRA 316, 328-329 (1991). *See e.g.,* Naval Fleet, 52 FLRA 950 (1997).

Efficiency of Agency Operations. Among the factors to consider in determining whether a unit will promote the efficiency of the agency operations are: the degree to which there is interchange outside the unit sought, the extent of differences with other groups of employees outside the unit sought, whether negotiations would cover problems common to employees in the unit, and bargaining history. *See, e.g.,* U.S. DoD, Nat'l Guard Bureau and Association of Civilian Technicians, 55 FLRA No. 115 (1999).

In Defense Logistics Agency, Defense Plant Representative Office (DPRO)-Thiokol, and AFFE, 41 FLRA 316, 330 (1991), the Authority discussed efficiency of agency operations and identified several factors that would counter a finding of improved efficiency.

> [W]e conclude that the petitioned-for unit would neither cause undue fragmentation nor hinder the efficiency of the Activity's operation. In this regard, DPRO Thiokol is a separate organizational component of the Activity, a secondary level field activity, with its own commander, performing contract administration functions at a separate manufacturer, which is geographically remote . . . The local commander has certain authority within the organizational component to administer the day-to-day mission of the organization . . Thus we find that DPRO Thiokol is not so functionally integrated with the other organizational components of the District that the petitioned-for unit would artificially fragment or cross the Activity's organizational line structure in a significant manner.

The Statute contains a preference for unit organization "on an agency plant, installation, functional, or other basis." 5 U.S.C. § 7112(a)(1). In OPM, Atlanta Regional Office and AFGE, 48 FLRA 1228 (1993), the Authority stated, "A proposed unit may meet the statutory criteria of effective dealings and efficiency of operations if it is structured around a functional grouping of employees who possess characteristics and concerns limited to that group." *Id. at* 1236.

The size of the proposed unit is a factor to be considered. It does not automatically disqualify a unit from being found appropriate. Size is a factor to be considered in the context of all relevant facts and circumstances. Edwards Air Force Base and Sport Air Traffic Controllers Organization, 35 FLRA 1311, 1314 (1990)(fifteen member unit).

It should be noted that there is a substantial overlap of factors with all three criteria. Satisfaction of one criteria will often satisfy all three. Only a union that has been elected as the exclusive representative for a particular bargaining unit may file a petition to reflect a change in union affiliation. U.S. Army Reserve Command, 88th Regional Support Command and AFGE Local 2144, 53 FLRA No. 93 (1998) (dismissing a petition for a change in union affiliation filed by a union wanting to represent

employees from another union). Questions as to the appropriate unit and related issues may be referred to the Regional Office for advice.

Although the Authority, in its unit determinations, refers to all three criteria, it appears that, apart from unit consolidation cases, greater reliance is placed on indicia of community of interest than on indicia of effective dealings and efficiency of agency operations. Such emphasis on community of interest indicia was also true of Assistant Secretary decisions. This is probably due to the influence of private sector case law under the National Labor Relations Act in which community of interest is the sole criterion of the appropriateness of units.

U.S. Dep't of Defense, Nat'l Guard Bureau
and Association of Civilian Technicians
and Washington Nat'l Guard, et al.
55 FLRA No. 115 (1999)

(Extract)

Background and the Regional Director's (RD's) Decision

The petition seeks to consolidate existing bargaining units in 39 states, the District of Columbia, Puerto Rico and the Virgin Islands, representing approximately 53 percent of eligible National Guard technicians nationwide.

National Guard technicians are a "hybrid class" of employee -- federal civilians who work in a military environment and under the immediate control of state officers. State of Nebraska, Military Department, Office of the Adjutant General v. FLRA, 705 F.2d 945, 946 (8th Cir. 1983); *see* New Jersey Air National Guard v. FLRA, 677 F.2d 276, 279-80 (3d Cir. 1982) (NJ National Guard). As a condition of their civilian employment, technicians must become and remain members of the National Guard, maintaining the particular military grade specified for their civilian positions. 32 U.S.C. § 709(b),(d),(e) (the Technician Act).

The hybrid nature of technician service reflects, in part, the unique federal-state character of the National Guard. *See generally*, Perpich v. Department of Defense, 496 U.S. 334, 340-51 (1990) (describing the history of the National Guard and the competing themes of federal and state control over guard units). Each state National Guard activity is headed by an Adjutant General, who is usually appointed by the governor. Department of Defense, National Guard Bureau and National Federation of Federal Employees, Independent and Department of Defense, National Guard Bureau and National Association of Government Employees, 13 FLRA 232, 234 (1983) (National Guard). The federal NGB is "a joint Bureau" of the Department of the Army (Army) and the Department of the Air Force (Air Force), and a liaison in coordinating the activities of the state officers, the

Army, and the Air Force. Id. The NGB is headed by a chief who reports on National Guard matters to the Chiefs of Staff of the Army and Air Force. RD's Decision at 7.

The Technician Act provides that technicians are considered "employees" of either the Army or the Air Force. 32 U.S.C. §709(d). The Secretary of either Department is required, however, to "designate" the Adjutants General of the states to "employ and administer" the technicians. 32 U.S.C. §709(c). In National Guard, the Authority described the joint federal-state management of technicians, stating that the NGB does not employ technicians or "exercise command over any state activity[,]" but it issues regulations pertaining to technicians' conditions of employment and work life. National Guard, 13 FLRA at 234. These regulations are administered by a personnel officer in each state who reports directly to the Adjutant General. Labor and personnel policies are administered by each state's Adjutant General.

Analysis and Conclusions

Under section 7112(d) of the Statute, two or more bargaining units represented by the same union may be consolidated "if the Authority considers the larger unit to be appropriate." See AFMC, 55 FLRA at 361. The reference in section 7112(d) to the consolidation of "appropriate" units incorporates the appropriate unit criteria established in section 7112(a). Those criteria provide that a unit may be determined to be appropriate if it will: (1) ensure a clear and identifiable community of interest among the employees in the unit; (2) promote effective dealings with the agency involved; and (3) promote efficiency of the operations of the agency involved. 5 U.S.C.§ 7112(a); AFMC, 55 FLRA at 361-62. The Authority has identified a number of factors that indicate whether these statutory criteria are met, see generally, FISC, 52 FLRA at 960-61, and has consistently applied these factors on a case-by-case basis. See Department of Justice, 17 FLRA at 62; Army and Air Force Exchange Service, Dallas, Texas and American Federation of Government Employees, AFL-CIO, 5 FLRA 657, 660-61 (1981) (AAFES).

The Petitioner asserts that the RD's decision misapplied the statutory criteria and erred particularly in holding that, under the Technicians Act, the states have a role in labor and employment relations. For the reasons explained below, we conclude that the RD properly construed the provisions of the Technicians Act and properly applied the appropriate unit test.

The RD properly applied established law in determining that the proposed consolidated unit is not appropriate.

1. The RD properly evaluated the community of interest criteria.

The Petitioner asserts that, contrary to the RD's decision, the proposed consolidated unit has a clear and identifiable community of interest

under section 7112(a). The RD relied on the factors set out in Department of Justice for determining whether employees share a community of interest, which are: the degree of commonality and integration of the mission and function of the components involved; the distribution of the employees involved throughout the organizational and geographical components of the agency; the degree of similarity in the occupational undertakings of the employees in the proposed unit; and the locus and scope of personnel and labor relations authority and functions. Department of Justice, 17 FLRA at 62; see also Naval Submarine Base, New London Naval Submarine School, Naval Submarine Support Facility New London, Personnel Support Activity New London and Naval Hospital Groton and National Association of Government Employees, Local R1-100, SEIU, AFL-CIO, 46 FLRA 1354, 1360-61 (1993). These factors are applied on a case-by-case basis, and the Authority has not specified the number of factors needed to find a clear and identifiable community of interest. See FISC, 52 FLRA at 960.

As stated above, the RD acknowledged that two of the Department of Justice criteria had been met. He based his finding that the proposed consolidated unit lacks a community of interest on the two remaining factors.

a. Similarity and integration of National Guard mission and function

With respect to the degree of commonality and integration of the mission and function of the components involved, the Authority has held that the separate missions of each component need only "bear a relationship" to one another, and the functions need only be "similar or supportive" to one another, to satisfy this appropriate unit criteria. See AFMC (citing Department of the Navy, U.S. Marine Corps and American Federation of Government Employees, AFL-CIO , 8 FLRA 15, 22 (1982)). See also AAFES, 5 FLRA at 661. Examining this factor in National Guard, the Authority stated that, "while the technicians are all working for the common mission of maintaining National Guard materiel, training its personnel, and administering its program, the employees are also subject to the unique missions established at the state level." National Guard, 13 FLRA at 237.

Here, the RD found that no meaningful changes had occurred to alter the conclusions reached in National Guard, stating that the "missions of the State Activities is significant in determining whether an appropriate unit may be established that crosses state lines" because of "the uniqueness of the [states] separate missions . . . ." RD's Decision at 13.

The Petitioner asserts that there is a "commonality of mission" within the proposed unit that would be no different than the commonality found in existing units. According to the Petitioner, "current bargaining units already span the greatest degree of diversity and separation in missions and functions that exists within the National Guard" -- those separating Army and Air Force components. Application at 15. However, the Petitioner's assertion is misdirected. The RD's decision, and the Authority's decision in National Guard, is based on a lack of commonality between the different missions of

the state components, not the Army and Air Force components. Any similarity between the Army and Air Force components does not bridge the wholly different issue of diversity between states in terms of their varied missions.

The Petitioner does not dispute the RD's conclusion that state units have separate military missions. The Petitioner argues, instead, that these missions are irrelevant to our determination, because these missions are performed in military, rather than civilian status. The Petitioner does not, however, offer any reason or evidence to contradict the RD's finding that technicians prepare for state military missions while in federal civilian status.

Under our case law, the mission and function of various agency components sought to be placed in a consolidated unit is evaluated not only to determine whether these features are "similar," but also whether the mission and function are "integrated." Department of Justice, 17 FLRA at 62. The separate authority exercised by the states over their respective military missions indicates a lack of integration of mission and function across state lines that outweighs any similarity in the actual duties that the technicians perform while preparing for and performing these responsibilities. We thus find that the Petitioner has not demonstrated that the RD misapplied this aspect of the community of interest test.

b. Labor Relations and Personnel Authority

In determining whether a community of interest has been established, the Authority evaluates the "locus and scope of personnel and labor relations authority and functions." Department of Justice, 17 FLRA at 62; AAFES, 5 FLRA at 661. Under this factor, the Authority "looks to whether policy-making authority over personnel and labor relations policy is consistent with the proposed consolidation[.]" AFMC, 55 FLRA at 363.

Consistent with National Guard, 13 FLRA at 235, the RD found that the states set labor relations and personnel policies through their respective adjutants general. The Petitioner disagrees, asserting that the Technician Act grants "plenary authority to regulate the employment of technicians" in the Secretaries of the Army and Air Force and limits the Adjutants General to the role of "designated . . . employers and administrators." Application at 20 (brackets in original) (quoting 5 U.S.C. §709(c)).

The Petitioner has not established any basis to reject the Authority's holding in National Guard. As we explained, the Petitioner's assertion that state authority is subordinate to federal authority in this respect ignores the hybrid authority set out in the Technician Act. A consolidation that ignored this hybrid authority would establish lines of authority for labor relations at odds with the lines of authority governing the employment of technicians in their work.

The authority of federal officials to issue regulations governing technician employment is necessarily accompanied by policy-making authority. However, the specific and irrevocable designations of authority to state officials contained in the Technician Act necessarily confers policy-making authority as well. The authority of state officials is greater than mere delegated, operational authority over day-to-day decision-making. *Cf*. AFMC, 54 FLRA at 363 (finding that the delegation of day-to-day operation of personnel and labor relations functions does not preclude consolidation). Rather, they exercise specific authority granted by the Technicians Act. Thus, the RD's conclusion is consistent with Authority precedent.

c. The Impact of Expanded Bargaining Rights.

The Petitioner asserts that RD should have considered the impact of expanded bargaining rights under section 7117(a) of the Statute in determining whether a community of interest had been established. The RD rejected this argument, stating that such a consideration is not a factor in determining a unit's appropriateness under section 7112(a).

As a matter of statutory construction, the RD's conclusion is sound. The bargaining rights discussed in Section 7117(a)(3), according to the provision's plain wording, apply only to "an exclusive representative [that] represents an appropriate unit." Thus, section 7117(a)(3) rights extended to a petitioning party only if separate bases have been satisfied and a unit determined to be appropriate.

Limitations on consolidation necessitated by the Technicians Act may have the effect of limiting the bargaining rights of these employees. However, nothing in the Statute guarantees that every group of employees will be able to avail themselves of all aspects of the Statute. A separate statutory scheme that applies to one group of employees may place limitations on their collective bargaining rights. See Phoenix Area Indian Health Service, Sacaton Service Unit, Hu Hu Kam Memorial Hospital, Sacaton, Arizona and Southwest Native American Health Care Employees, Local 1386, LIUNA, AFL-CIO, 53 FLRA 1200, 1219 (1998) (noting that technicians serve under a statutory scheme that places many working conditions that are ordinarily negotiated outside the scope of bargaining).

In sum, the RD did not err in determining that the proposed consolidated unit did not share a community of interest.

2**. The RD properly applied established law in determining that consolidation would not promote effective dealings or the efficiency of the agency operations**.

In determining whether consolidation would promote effective dealings and efficient agency operations, the Authority examines a number of factors, including: whether personnel and labor relations authority is centralized and broad operating polices exist at the national level; whether consolidation will

reduce bargaining unit fragmentation, thereby, "promoting a more effective, comprehensive bargaining unit structure to effectuate the purposes of the Statute" (AAFES, 5 FLRA at 661-62); and whether the unit would adequately reflect the agency's organizational structure or would require creating a new agency structure. National Guard, 13 FLRA at 237. As a general matter, the Authority also considers the past collective bargaining experience of the parties in making "effective dealings" determinations. FISC, 52 FLRA at 961; AFMC, 55 FLRA at 364.

The Petitioner argues that consolidation would end the duplicative acts of negotiating separate contracts at the local level. The RD's conclusion that this criteria was not met is based, however, on his determination that the NGB is without authority to engage in collective bargaining on behalf of the states and on his determination that effective bargaining relationships currently exist. Although acknowledging that the proposed consolidated unit "represents more employees in units better distributed geographically and organizationally than the unions involved in National Guard," the RD relied on the retention of labor relations authority at the state level as indicating that consolidation would not be effective and would not promote efficient operations because the proposed consolidated unit would extend across state lines. RD's Decision at 14.

Essentially, the RD determined that the proposed consolidated unit would require a structuring of the National Guard inconsistent with the dictates of the Technicians Act. This determination, along with the RD's consideration that effective bargaining relationships already exist at the state level, is consistent with Authority precedent, see AFMC, 55 FLRA at 364, FISC, 52 FLRA at 961, and is also consistent with the Authority's holding in National Guard.

Based on the foregoing, the Authority finds that there is no basis for granting review of the RD's determination that the proposed consolidated unit would not promote effective dealings and the efficiency of agency operations.

3. The RD properly concluded that consolidation of the bargaining units was not appropriate.

In sum, the Petitioner has not established grounds warranting review of the RD's determination that a community of interest among employees was not established and that the proposed consolidated unit would not promote effective dealings and the efficiency of the National Guard's operations. Since all three section 7112(a) criteria must be met for a unit to be found appropriate, see U.S. Department of Housing and Urban Development and National Federation of Federal Employees, Independent, 15 FLRA 497, 500 n.6 (1984), the proposed unit is not appropriate under section 7112(a) of the Statute, and the RD properly dismissed the petition.

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c. How Appropriate Units Are Determined.

(1) Agreement by Parties. Subsequent to the notice being posted, management will consider whether the unit is appropriate. Management and the union will meet and, hopefully, agree on an appropriate unit (consent agreement). This consent agreement, along with other relevant matters (such as objections based upon certification, election, and agreement bars; challenges to the union's status, etc.) will be forwarded to the Regional Director.

(2) Determination by the Regional Director and the Authority.

(a) If management objects to the appropriateness of the bargaining unit, it should file an objection with the Regional Director. Further, the Regional Director will review the appropriateness of a unit even when the parties have agreed to insure it is consistent with the policies of Title VII and precedent decisions.

(b) Even when both parties strongly agree upon the composition of a unit, the Regional Director may nevertheless refuse to certify as a result of his independent evaluation of the unit.

d. Persons/Units Specifically Excluded or Distinguished.

There are certain classes of employees who are not allowed, by Title VII, to organize and be represented by an exclusive representative. Often there is an objection by management because these personnel are included in the proposed unit. 5 U.S.C. § 7112(b) and (c) provide:

> (b) A unit shall not be determined to be appropriate . . . if it includes--
>
> (1) except as provided under section 7135 (a)(2) of this title, any management official or supervisor;
>
> (2) a confidential employee;
>
> (3) an employee engaged in personnel work in other than a purely clerical capacity;
>
> (4) an employee engaged in administering the provisions of this chapter;
>
> (5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;
>
> (6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or
>
> (7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency

whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

(c) Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization--

(1) which represents other individuals to whom such provision applies; or

(2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

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1. Supervisors.

FSLMRS § 7103(a)(10). "'Supervisor' means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising such authority;"

**NAVAL EDUCATION AND TRAINING CENTER,
NEWPORT, RHODE ISLAND AND
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS**

3 FLRA 325 (1980)

(Extract)

The Petitioner seeks to clarify an existing exclusively recognized unit of the civilian personnel of the Fire Protection Branch of the Naval Education and Training Center to include ten employees currently classified as Supervisory Firefighter, GS-6 (hereinafter referred to as Fire Captain), contending that these employees are not supervisors within the meaning of § 7103(a)(10) of the Statute. The Activity contends that the incumbents in the subject classification are supervisors within the meaning of § 7103(a)(10) of the Statute and, on this basis, opposes their inclusion in the certified unit. Section 7103(a)(10) defines supervisor . . .

The Fire Protection Branch is composed of one Fire Chief, two Assistant Fire Chiefs, ten Fire Captains (GS-6), 40 Firefighters (GS-5), and 12 employees who perform various functions ranging from inspectors to alarm operators. The Fire Protection Branch occupies four stations and a headquarters building in the geographical area for which it is responsible. The Headquarters is staffed by the Fire Chief and the two Assistant Fire Chiefs. Fire Station No. One is manned by eight Firefighters and two Captains, No. Three, by six Firefighters, two Captains, No. Six being two separate shifts manned each by seven Firefighters and two Captains (a total of 14 Firefighters and four Captains), plus two Firefighters who stand duty on Gould Island, and Station No. Nine staffed by ten Firefighters and two Captains.

The Fire Chief is the primary supervisory official and is responsible for directing the administrative operation of the Fire Protection Branch. He works a standard 8:00 a.m. to 5:00 a.m. shift, Monday through Friday. The two Assistant Chiefs are supervisors, responsible for overseeing and directing the actual work-force. Their hours correspond with the 24 hour shifts which the Fire Captains and Firefighters work.

Although the Assistant Fire Chiefs are located at Headquarters, their job functions are integrally related to the activities occurring in and about the fire stations. The Assistant Chief is in charge of all firefighting operations once he arrives on the scene of the fire. In most cases, the Assistant Chief will appear from three to five minutes after the arrival of the fire crew led by the Fire Captain. In addition, the Assistant Fire Chief makes at least one daily visit to every fire station; the time spent on the visit ranges between 15 minutes and one hour. The visits may increase depending upon the nature of the problems being experienced by the particular station. The purpose of the visits is to discuss with the station's Fire Captain problems which may have arisen concerning personnel, equipment, building conditions, supplies, and/or departmental procedures. The Assistant Fire Chief is also responsible for training personnel and conducting drills in firefighting technique. The Assistant Fire Chief also officially reviews all the Performance Appraisals submitted by the Fire Captains.

The record reveals that the Fire Captains do have additional duties, responsibilities, and authority in the fire station as compared with the other Firefighters. Their authority is, however, limited. Fire Captains <u>do not</u> hire, promote, suspend, remove, transfer, furlough, layoff, or recall employees. However, Fire Captains assign tasks set out in the Daily Work Assignments, which is, in fact, a directive from Headquarters. The Daily Work Assignments designates the duties to be accomplished by the station crew as a whole on a day to day basis (washing trucks, cleaning equipment and the station). The Captain may order the Firefighter he wishes to the job. Additionally, he does not have to abide by the daily schedule, so long

as the daily work assignments are completed within the week. The record discloses that the assignment of personnel to perform the daily tasks is considered a routine procedure taken directly from a long-standing and established rotation system designated to make each Firefighter share equally in all of the work.

The record further reveals that Fire Captains direct the Firefighters to a limited extent. Captains are the supervisory officer at most fires prior to the arrival of the Assistant Fire Chief (about a three to five minute period). Assistant Fire Chiefs direct all operations once they arrive. All responses to fire are predetermined in a pre-fire plan program. More specifically, drills are conducted for specific alarms, and in case of an actual fire, the fire crew responds exactly as they had previously done in the drill. The instructions for these drills come from the Assistant Fire Chiefs.

Fire Captains do undertake annual performance evaluations of employees. Evidence indicates that not much time is devoted to this responsibility. These evaluations apparently have some impact in rating the employees in determining the order of RIF's. Captains are also responsible for approving within-grade increases to employees, but cannot award quality step increases.

The record discloses that Fire Captains do have limited authority to discipline employees. They can issue oral and written reprimands. They cannot, however, unilaterally suspend employees and the evidence indicates that their recommendations carry little, if any, weight. The Captains also have a limited authority to award employees. In evaluating employees, the ratings may be such as to gain additional seniority for the employee and/or a small monetary award. Apparently, the Captain may also submit a recommendation for an award outside of the performance evaluation. Recommendations for promotion by Captains also appear to have little influence on Activity promotional decisions.

Fire Captains do have the authority to adjust minor grievances if the settlements are satisfactory to the employee. They do not participate once a formal grievance is filed. Fire Captains do not have official contact with shop stewards. The Captains are responsible for maintaining order within the work place.

As previously indicated the Federal Labor-Management Relations Statute, § 7103(a)(10), provides that in determining the supervisory status of a firefighter, a more particular standard of assessment will be applied as compared to other employees. Section 7103(a)(10) states:

with respect to any unit which includes firefighters or nurses, the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising such (supervisory) authority;

The record reveals, as detailed above, that although certain aspects of the Fire Captains' job function may involve the exercise of supervisory authority, their overall employment time is spent in either routinely administering Activity directives, performing routine and clerical duties, or waiting to respond to an alarm.

The Authority thus finds that the evidence contained in the record supports the Petitioner's contention that the Fire Captains, GS-6, are not supervisors under § 7103(a)(10) of the Statute, in that they do not devote a preponderance of their employment time to supervisory functions. Accordingly, the Authority finds Fire Captains serving at fire houses at the Naval Education and Training Center, Newport, Rhode Island, are not supervisors within the meaning of the Statute, and will be included within the bargaining unit.

IT IS HEREBY ORDERED that the unit sought to be clarified, in which exclusive recognition was granted to the International Association of Firefighters, Local F-100, on July 8, 1974, at the Naval Education and Training Center, Newport, Rhode Island, be and hereby is, clarified by including in said unit the position of Supervisory Firefighter, GS-6 (Fire Captain).

The statute requires the employee to consistently exercise independent judgment in order to be considered a supervisor. A WG-11 electrician who headed the evening shift, handed out preexisting work assignments, and directed the work of other shift employees was not a supervisor. The directing and assigning of work the electrician did was routine and did not require the consistent exercise of independent judgment, U.S. Army Armor Center, Fort Knox, KY, 4 FLRA 20 (1980). *See e.g.,* U.S. Army, Dugway Proving Ground, Dugway, Utah, 8 FLRA 684 (1982) (the Authority sometimes refers to these as "leader" positions).

The Authority has held that the employee is a supervisor if the employee consistently exercises one of the supervisory indicia set forth in 5 U.S.C. § 7103(a)(10). Department of Veterans Affairs, VA Medical Center, Allen Park, Michigan, 35 FLRA 1206 (1990).

In Department of the Interior, BIA, Navajo Area Office, Gallup, New Mexico and American Federation of Teachers, 45 FLRA 646 (1992), the Authority adopted the principles used by the private sector (National Labor Relations Board) in determining

whether a person is a supervisor. The Authority found that the employee's evaluations of other employees, which would affect hiring decisions and were based on the employee's own independent judgment, made him a supervisor.

The temporary detail of a supervisor to an unclassified position pending the outcome of an investigation does not justify including him in the bargaining unit. The union argued that since employees temporarily detailed as supervisors were excluded from the unit, employees temporarily detailed from supervisory positions should become part of the unit. The FLRA disagreed and found that the employee lacked a community of interest with those in the bargaining unit. Federal Aviation Technical Center, Atlantic City Airport, 44 FLRA 1238 (1992)(the temporary detail had been for over one year when the union filed the request to include the employee in the unit).

To be classified as a supervisor, the supervisor must exercise authority over individuals who are "employees" as defined in section 7103(a)(2). If the supervisor has authority only over aliens, non-US citizens or military personnel, he is not a supervisor. Section 7103(a)(10) provides that "supervisor" means an individual having authority over "employees," who are defined, in pertinent part, as individuals employed in an agency, but does not include an alien, or noncitizen who occupies a position outside the United States or a member of the uniformed services. *See* Interpretation and Guidance, 4 FLRA 754 (1980), and New York, N.Y., 9 FLRA 16 (1982).

A supervisor or management official may join a union, but may not participate in management of the union or be a member of the union leadership. *See* Department of Labor and Susan Wuchinich, 20 FLRA 296 (1985); Nuclear Regulatory Commission and NTEU, 44 FLRA 370 (1992)(Both these cases began as unfair labor practice cases under 5 U.S.C. § 7116(a)(3), alleging management interference with a labor organization.)

5 U.S.C. § 7135(a) contains an exception (grandfathering in several existing units) which allows initial or continued recognition of a bargaining unit containing only management officials or supervisors. In such cases, the issue of union leadership creates several interesting questions.

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2. Confidential Employees.

"'[C]onfidential employee' means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations". 5 U.S.C. § 7103(a)(13).

Social Security Administration
and American Federation of Government Employees
56 FLRA No. 176 (2000)

(Extract)

The Legal Assistant positions in dispute in this proceeding are in the Activity's Office of the Regional Chief Counsel, Region III, Philadelphia, Pennsylvania. These positions were created and filled in 1998. Three of the four employees selected for the Legal Assistant positions had previously been employed as Legal Technicians for the Activity, and their previous positions were included in the bargaining unit.

The Office of the Regional Chief Counsel handles three types of legal activity: (1) representing the Activity in the program law area; (2) providing legal advice; and (3) representing the Activity in the general law area, including personnel law issues. The program law work is not at issue here, because these assignments do not involve internal labor-management relations issues or personnel matters.

The Legal Assistants work directly with the attorneys assigned to EEOC or MSPB cases and assist the attorneys in various ways--administratively, clerically and technically. The work includes formatting briefs and other documents, making copies, sending material to the parties, keeping the attorney appraised of calendar dates, and compiling documents. Other duties performed by the Legal Assistants are proofreading, checking citations, checking punctuation, spelling and grammar, and reviewing format. The Legal Assistants also create and maintain case files. On occasion the attorneys have discussed the merits or strategies of a case with the Legal Assistants. The Legal Assistants may also have sat in on settlement discussions or interviews and taken notes. Nothing in the record showed that the Legal Assistants' presence at these meetings was in any capacity other than observer or note taker. The Legal Assistants have not been present at depositions or hearings.

The RD (Regional Director) found that the incumbents of the Legal Assistant positions at issue are not confidential employees within the meaning of the Statute. He concluded that while the Legal Assistants act in a confidential capacity to the attorneys, the record failed to establish either that they do so with respect to individuals who formulate or effectuate management policies in the field of labor-management relations, or that there is a confidential relationship between these employees and the individuals they work for when the latter are performing duties in the labor-management relations field. The RD found that although attorneys in the Office of the Regional Chief Counsel effectuate management's policies in internal labor-management relations, that involvement is limited to providing advice to the employee and labor relations staff and to managers. While the attorneys do provide legal advice in the field of labor-management relations, the Legal Assistants do not act in a confidential capacity to them when they are performing this function.

Analysis and Conclusions

Section 7103(a)(13) of the Statute defines a "confidential employee" as an employee "who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations." An employee is confidential if: (1) there is evidence of a confidential working relationship between an employee and the employee's supervisor; and (2) the supervisor is significantly involved in labor-management relations. An employee is not confidential in the absence of either of these requirements. United States Dep't of Labor, Office of the Solicitor, Arlington Field Office, 37 FLRA 1371, 1376-77, 1383 (1990) (DoL Solicitor).

The Activity has not supported its assertion that there is a lack of precedent, or that the RD's decision conflicts with precedent, regarding whether the Legal Assistants should be excluded as confidential employees based on their relationship with the attorneys in the Office of the Regional Chief Counsel. The attorneys' duties, on which the Activity relies to support its claim, do not constitute the type of responsibilities that the Authority has found are aspects of the formulation or effectuation of management policies in labor relations. The responsibilities identified by the Authority as being in that category include advising management on or developing negotiating positions and proposals, preparing arbitration cases for hearing, and consulting with management regarding the handling of unfair labor practice cases. See, e.g., United States Dep't of Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Ariz., 37 FLRA 239, 240-41 (1990); Red River Army Depot, Texarkana, Tex., 2 FLRA 659, 660 (1980) (Red River). The record supports the RD's conclusion that the attorneys are not significantly involved in formulating or effectuating management policies in the field of labor-management relations. See, e.g., United States Dep't of Justice, Fed. Bureau of Prisons, United States Penitentiary, Marion, Ill., 55 FLRA 1243, 1246-47 (2000) (Bureau of Prisons, Marion); Dep't of Veterans Affairs, Reg'l Office, Waco, Tex., 50 FLRA 109, 111-12 (1995).

The Authority bases bargaining unit eligibility determinations on testimony as to an employee's actual duties at the time of the hearing rather than on duties that may exist in the future. DoL Solicitor, 37 FLRA at 1377; United States Dep't of Hous. and Urban Dev., Washington, D.C., 35 FLRA 1249, 1256-57 (1990) (HUD). Bargaining unit eligibility determinations are not based on evidence such as written position descriptions or testimony as to what duties had been or would be performed by an employee occupying a certain position, because such evidence might not reflect the employee's actual duties. Contrary to the Activity's assertion that the RD's decision is not consistent with Authority precedent, the RD's decision follows and applies Authority precedent. The Authority's only exception to the well-established principle that bargaining unit eligibility is based on an employee's actual duties at the time of the hearing, arises in cases where an employee has recently encumbered a position. In that circumstance, the Authority considers duties to have been actually assigned where: (1) it has been demonstrated that, apart from a position description, an employee has been informed that

he or she will be performing the duties; (2) the nature of the job clearly requires those duties; and (3) an employee is not performing them at the time of the hearing solely because of lack of experience on the job. See DoL Solicitor, 37 FLRA at 1378. That situation is not present here and the Activity's reliance on DoL Solicitor is misplaced.

Moreover, contrary to the Activity's assertion, there is no absence of precedent concerning whether a law office's ethical obligations are appropriately considered in determining an employee's bargaining unit status. For example, the Authority has stated that, in making bargaining unit determinations, ethical requirements governing the legal profession are not considered. See, e.g. id. at 1381, citing United States Dep't of the Treasury, Office of Reg'l Counsel, W. Region, 1 F.L.R.C. 258, 260 (1973) (American Bar Association's Model Canons of Professional Responsibility restrictions upon the conduct of its members do not control unit determinations and qualifications of a labor organization for exclusive recognition under Executive Order 11491).

The record demonstrates that the Legal Assistants help the attorneys with cases before the EEOC and the MSPB. While information involved in such cases may be personal or sensitive, it does not constitute confidential material within the meaning of §7103(a)(13) of the Statute because the information is not related to the labor-management relations program. Under the Authority's well-established precedent, employees performing duties such as those performed by the Legal Assistants are not confidential employees within the meaning of the Statute. For the reasons set forth above, the Activity has not demonstrated that there is an absence of applicable precedent.

Accordingly, we find that there is no absence of or departure from applicable precedent and no basis for review of the RD's decision that the Legal Assistants should not be excluded from the bargaining unit as confidential employees.

Further, as to the Activity's contention that the Legal Assistants act in a confidential capacity to the attorneys in the Office of the Regional Chief Counsel, the Authority has determined that an employee's "confidential" status to management does not compel a conclusion that the employee is "confidential" within the meaning of §7103(a)(13) of the Statute. See United States Dep't of Hous. and Urban Dev. Headquarters, 41 FLRA 1226, 1237 (1991), reconsideration denied, 42 FLRA 220 (1991). Moreover, regarding the Legal Assistants' access to confidential documents regarding cases, the Authority has long held that mere access to material related to internal labor-management relations is not sufficient to establish confidential capacity within the meaning of the Statute. See, e.g., Red River, 2 FLRA at 661.

As cited in the case above, the Authority summarized the rules for determining if an employee is confidential as follows: "An employee is confidential if: (1) there is evidence of a confidential relationship between an employee and the employee's supervisor; and (2) the supervisor is significantly involved in labor-management relations. An employee is not confidential in the absence of either of these requirements." Department of Housing and Urban Development Headquarters and AFGE, 41 FLRA 1226, 1234 (1991) *citing* Department of Labor, Office of the Solicitor, Arlington Field Office and AFGE, 37 FLRA 1371 (1990) (excluding ten General Attorney positions from the bargaining unit because the attorneys were confidential employees).

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3. Management Officials.

"'[M]anagement official' means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency." 5 U.S.C. § 7103(a)(11).

U.S. Dep't of Justice and National Association of Immigration Judges

56 FLRA No. 97 (2000)

(Extract)

Background

The Agency filed a petition seeking a determination as to whether employees who encumber the position of Immigration Judge are management officials within the meaning of section 7103(a)(11) of the Federal Service Labor-Management Relations Statute (Statute). n1 The Agency maintained that changes in the duties and responsibilities of its Immigration Judges have occurred since the bargaining unit was initially certified and, as a result, that these employees are now management officials. Consistent with this claim, the Agency further maintained that the unit is no longer appropriate.

n1 Section 7103(a)(11) provides:

(11) "management official" means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine or influence the policies of the agency[.]

The RD observed that the Union was certified in 1979 as the exclusive representative of a unit of Immigration Judges employed by the Immigration and Naturalization Service (INS). n2 Four years later, in 1983, the Executive Office for Immigration Review (EOIR) was created through an internal

reorganization in which the Immigration Judge function, previously performed by employees of the INS, was combined with the Board of Immigration Review. The primary function of the Board is to hear appeals of the Judges' decisions. n3

n2 The unit is described as:

INCLUDED: All Immigration Judges employed by the Immigration and Naturalization Service throughout the United States.

EXCLUDED: All other professional and nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors and guards as defined in the Order. RD's Decision at 2.

Immigration Judges are appointed by the U.S. Attorney General for the purpose of conducting formal, quasi-judicial proceedings involving the rights of aliens to enter or remain in the United States. It is undisputed that these duties have remained essentially unchanged since the early 1970s when the position was titled "Special Inquiry Officer" and located in the INS. Pursuant to a regulatory change in 1973, incumbents of this position were formally authorized to use the title "Immigration Judge." By 1979, when the unit was certified, all of the Judges were, and have continued to be, attorneys.

Organizationally, Immigration Judges serve in 52 courts located throughout the country. The Office of the Chief Immigration Judge, which is also located within the EOIR, is responsible for providing overall policy direction, as well as operational and administrative support, to the Immigration Courts. Two Deputy Chief Immigration Judges assist the Chief Judge in providing program direction and establishing priorities for the Immigration Judges. Supervisory responsibility for the Judges, however, is directly delegated to eight Assistant Chief Immigration Judges, who serve as the principal liaison between the Office of the Chief Judge and the Immigration Courts. Although the Assistant Chief Immigration Judges serve as first-line supervisors for the Immigration Judges, they do not evaluate the Immigration Judges or review their decisions. Rather, in their ad judicatory role, the Judges are independent.

The daily activities of the Immigration Courts are managed by the court administrators who, like the Judges, are supervised by an Assistant Chief Immigration Judge. It is the responsibility of the court administrators to hire, supervise, and evaluate the court's support staff, including language clerks, language specialists, legal technicians, and clerk/typists. Court administrators, however, "[do] not share the supervisory responsibility with [the] Immigration Judges, who have no supervisory responsibility or authority." RD's Decision at 4.

The daily routine of an Immigration Judge involves hearing and deciding cases that arise from the operation of the INS. A court's jurisdiction to decide these cases is determined at the time a case is filed. After filing, the cases are randomly assigned by the court administrator to an individual Judge and placed on a Judge's calendar on his or her master calendar day. At that time, the Judge hears presentations from the parties and their attorneys, identifies the issues, and advises individuals as to their right to representation. The Judge also sets time frames and briefing schedules, as well as the date for trial.

During a trial, the parties are represented by counsel and the rules of evidence are observed. Thereafter, in arriving at their decisions, Immigration Judges are required to apply immigration statutes, applicable regulations, published decisions of the Board of Immigration Appeals and federal appellate courts, and other foreign and state laws. After the trial, the Judge issues his or her decision, almost always orally, and advises the parties of their appeal rights. Oral decisions are not transcribed unless they are appealed; are not published; and are final and binding only with respect to the parties to the case. With limited exception, decisions of the Immigration Judges may be appealed to the Board of Immigration Appeals and review of their decisions is de novo. Certain cases may also be appealed to the appropriate U.S. circuit court.

RD's Decision

The RD found that under section 7103(a)(11) of the Statute, a management official is defined as "an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency." Id. at 8. The RD additionally found that in Department of the Navy, Automatic Data Processing Selection Office, 7 FLRA 172, 177 (1981) (Navy/ADP), the Authority held that management officials are individuals who: (1) create, establish or prescribe general principles, plans or courses of action for an agency; (2) decide upon or settle upon general principles, plans or courses of action for an agency; or (3)bring about or obtain a result as to the adoption of general principles, plans or courses of action for an agency.

Applying the definition set forth in Navy/ADP to the facts of this case, the RD concluded that Immigration Judges are not management officials within the meaning of the Statute. In reaching this result, the RD first rejected the Agency's claim, based upon U.S. Department of Justice, Board of Immigration Appeals, 47 FLRA 505 (1993) (BIA), that Immigration Judges make policy through the issuance of their decisions. In this connection, the RD observed that the nature and effect of the Judges' decisions has not changed since the unit was certified in 1979. The RD further observed that the definition of a management official has also remained unchanged during this period of time. Next, the RD observed that in arriving at their decisions, Immigration Judges are required to apply immigration laws and regulations,

that their decisions are not published and do not constitute precedent. Finally, the RD observed that the decisions are binding only on the parties to the case, are "routinely" appealed, and are subject to de novo review. RD's Decision at 9. Based on these factors, the RD found that the role of an Immigration Judge can be readily distinguished from that of a member of the Board of Immigration Appeals. According to the RD, unlike decisions of an Immigration Judge, decisions of the Board of Immigration Appeals constitute a final administrative ruling, are binding on the Judges below and, consequently, influence and determine immigration policy.

As concerns the Agency's assertion that Immigration Judges make policy on both the local and national levels through their involvement in other Agency activities, the RD observed that the Agency principally relied on the development of local rules governing the practice in some courts. According to the RD, these rules govern such matters as filing procedures, motion practice, attorney withdrawal or substitution procedures, and other details of practice in a particular court. As such, the RD found that "they constitute rules for the conduct of parties in the courts, [and] not Agency policy." Id. at 10. In this connection, the RD observed that these rules are "necessarily established within the framework of the Code of Federal Regulations and must be approved by the [Office of the Chief Immigration Judge]." Id. The RD further observed that not all courts have developed them, and in some courts such rules are merely discretionary. The RD accordingly determined, based on precedent such as U.S. Department of Energy, Headquarters, Washington, D.C., 40 FLRA 264 (1991) (DOE, Headquarters), that the Agency had failed to establish that such activities involved the formulation, determination, or influencing of agency policy.

The RD also found that other activities cited by the Agency failed to establish that Immigration Judges are now management officials. These activities included, inter alia, participation of some Judges on advisory committees to the Office of the Chief Immigration Judge; the opportunity for Judges to review and comment on OPPMs; and participation in the court evaluation system. In the RD's view, while these activities "appear to be commendable efforts to utilize the professional expertise of the [Agency's] employees and to seek input from those on the front-lines, employees who perform such ad hoc tasks and lend their expertise and assistance are not establishing agency policy[.]" RD's Decision at 11.

Finally, the RD found no merit in the Agency's contention that Immigration Judges are management officials by virtue of their judicial independence, professional stature and qualifications, the formal amenities of the courtroom and other similar factors. According to the RD, the record establishes that over the years, the professional status of the Immigration Judge has been recognized and increasingly supported by OPM, Congress, the Department of Justice, and by the Office of the Chief Immigration Judge itself. In particular, the RD noted that in a 1996 memoranda entitled

"Clarification of Organizational Structure and Supervisory Responsibilities," the current Chief Judge stated:

> This organizational structure and supervisory delegation was established so that the Immigration Judges are unencumbered by any supervisory and management obligations and are free to concentrate on hearings. The Immigration Judges [function] in an independent decision-making capacity determining the facts in each case, applying the law, and rendering a decision.

Id. at 11-12. Moreover, the RD further noted that when asked at the hearing whether these statements were true at the time they were written, and whether they continued to be true, the Chief Judge replied "yes" to both questions. Based on these circumstances the RD determined:

> While the Judges have some authority to control practice in their own courtrooms, they have no authority to set overall policy as to how the courts as a whole will operate. Nor do they have the authority to direct or commit the Agency to any policy or course of action. They are highly trained professionals with the extremely important job of adjudicating cases.
>
> The RD, accordingly, concluded that Immigration Judges are not management officials and that the bargaining unit continues to be appropriate.

As discussed in National Association of Immigration Judges above, the Authority, in Department of the Navy, Automatic Data Processing Selection Office, 7 FLRA 172 (1981), interpreted the definition of management official as, "[T]hose individuals who: (1) create, establish or prescribe general principles, plans or courses of action for an agency; (2) decide upon or settle upon general principles, plans or courses of action for an agency; or (3) bring about or obtain a result as to the adoption of general principles, plans or courses of action for an agency." *Id.,* at 177.

In United States v. Army Communications Command, Fort Monmouth, N.J. and NFFE, 4 FLRA 83 (1980), the Authority looked at numerous positions and held that auditors, electronics engineers and project officers were management officials. Communication specialists, data management officers, financial management officers, general engineers, procurement analysts, program analysts, public information officers, and traffic managers were not management officials. The rationale for each determination was linked to the duties performed, not the title of the position.

In Department of Agriculture, Food and Nutrition Service and NTEU, 34 FLRA 143 (1989) the Authority held that a computer specialist was not a management official since in the event there was a problem, the employee would only be an advisor to the decision maker. The Authority distinguished this case from Environmental Protection Agency, Research Triangle Park, North Carolina, 12 FLRA 358 (1983) where an ADP Security Specialist was found to be a management official because he developed

security policy and had the authority to shut down the facility in the event of a security breach.

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4. Professionals.

FSLMRS § 7103a(15). ". . . 'professional employee' means-

(A) an employee engaged in the performance of work-

(i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities);

(ii) requiring the consistent exercise of discretion and judgment in its performance;

(iii) which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and

(iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

(B) an employee who has completed the courses of specialized intellectual instruction and study described in subparagraph (A)(i) of this paragraph and is performing related work under appropriate direction or guidance to qualify the employee as a professional employee described in subparagraph (A) of this paragraph;"

5 U.S.C. § 7112(b) prevents professionals from being included in a unit with nonprofessional employees "unless a majority of the professional employees vote for inclusion in the unit." *See* Department of Defense, U.S. MEPCOM, Headquarters, Western Sector, Oakland Army Base and AFGE, 5 FLRA 3 (1980).

The professional will consider two matters when he votes in the secret ballot representation election. The first is whether or not she desires to be part of the proposed bargaining unit with nonprofessional employees. The second is whether he wants to be represented by one of the unions on the ballot. *Id.*, at 6.

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5. Work directly affecting national security.

Although the President has authority to exclude organizations from the coverage of the statute for national security reasons, authority to exclude a particular individual engaged in national security work is vested in the Authority. 5 U.S.C. § 7112(b)(6). With respect to national security exclusions, there is no need to establish that the employee is primarily engaged in such work. DOE, Oak Ridge, 4 FLRA 627 (1980); Defense Mapping Agency, West Warwick, Rhode Island and AFGE, 13 FLRA 128 (1983). 5 U.S.C. § 7112(b)(6) is not limited to individuals primarily engaged in National Security work. The test is (1) the individual employee is engaged in the designated work, and (2) the work affects national security. The Authority indicated an intent to narrowly interpret the term "national security" to include "only those sensitive activities of government that are directly related to the protection and preservation of the military, economic, and productive strength of the United States. . . " Oak Ridge, 4 FLRA at 655-656.

In Department of the Navy, U.S. Naval Station, Panama and AFSCME, 7 FLRA 489 (1981) the Authority held that a Classified Material Systems Custodian should be excluded because he reviews and logs in all classified material. The fact that he handles highly classified communications directly affecting national security was a sufficient basis for excluding him from the unit.

6. Employees Engaged in Internal Security.

The Authority may also exclude employees who investigate and audit others whose duties affect the internal security of the agency. 5 U.S.C. § 7112(b)(7). The language of section 7112(b)(7) requires that only employees "primarily" engaged in investigating and auditing employees whose work directly affects the internal security of an agency are to be excluded from units. DOL, Office of the Inspector General, Boston, 7 FLRA 834 (1981).

e. Other Excluded or Distinguished Employees. There are other classes of employees who are excluded or distinguished from the bargaining unit employees. *See* 5 U.S.C. § 7112(b). Though normally excluded, intermittent employees, who are otherwise eligible for union membership, and who have a reasonable expectation of continued employment, may be included in a prospective bargaining unit. Ft. Buchanan Installation, Club Management System, 9 FLRA 143 (1982).

2-8. The Representation Election.

a. General.

5 U.S.C. § 7111(a).

An agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot

election, by a majority of the employees in an appropriate unit who cast valid ballots in the election.

The election is conducted by the agency under the supervision of the Regional Director. The parties will agree as to the conduct of the election or, where they cannot agree, the Regional Director will dictate the procedures to be followed. Matters often addressed in the "consent agreement" are: the procedures to be used for challenged ballots, provisions for observers, period for posting the "notice of election," procedures for checking the eligibility list and for mail balloting, positions on the ballot, custody of the ballots, runoff procedures, and wording on the ballot.

Each party will be designated an equal number of observers who are to insure the election is conducted fairly, the integrity of the secret ballot is maintained, and all eligible voters are given the opportunity to vote.

Note that merely a majority of the valid votes cast (not a majority of employees in the unit) is needed by the labor organization to win as the exclusive representative. *See* Department of Interior, 34 FLRA 67 (1989) (only 3 of 17 eligible voters actually cast ballots, yet the union was certified as the exclusive representative).

b. Results of the Election.

(1) Certification. (5 C.F.R. § 2422.32). If a union receives a majority of the votes cast, it is certified as the bargaining representative for the unit of employees. If the union loses the election, a certification of results is issued by the Regional Director.

(2) Runoff Elections. (5 C.F.R. § 2422.28). A runoff election will be conducted when there were at least three choices on the ballot, i.e., at least two unions and a "neither" or "none," and no choice received a majority of the votes. The election will be between the choices who received the highest and second highest number of votes in the original election.

(3) Inconclusive Election. (5 C.F.R. § 2422.29). An inconclusive election is one in which no choices received a majority of the votes, and there are at least three choices. A new election is held when all choices received the same number of votes, or two received the same number of votes and the third received more but not a majority; or, in a runoff election, both selections received the same number of votes.

2-9. Objections to Elections and Challenged Ballots; Neutrality Doctrine.

a. Procedures (5 C.F.R. § 2422.26).

A dissatisfied party (normally a union which loses an election) may file an objection to the election within five days after the tally of ballots has been furnished, seeking a new election. The objection may be to the procedural conduct of the election or to conduct which may have improperly affected the results of the election. The objections must be specific, not conclusory. Within ten days after filing the objection, the objecting party shall file with the Regional Director statements, documents and other materials supporting the objections.

Failure to file the objections within five days will result in a denial of the application for review. In Department of Veterans Affairs, Chattanooga National Cemetery and AFGE, 45 FLRA 263 (1992), the activity filed objections to an election seven days after the tally of votes. The application for review was denied.

The Regional Director conducts an investigation. The facts are gathered, arguments heard, and a decision made whether to sustain the objections and order a new election, overrule the objections, or, if a substantial issue exists which cannot be summarily resolved, to issue a notice of Hearing on Objections.

The Hearing on Objections is held before an Administrative Law Judge (ALJ) with the objecting party bearing the burden of proof. All necessary witnesses are considered in a duty status. The ALJ files a report and recommendations with the Authority.

In the following case, several employees filed an objection to the election.

DEPARTMENT OF VETERANS AFFAIRS JOHN J. PERSHING MEDICAL CENTER, POPLAR BLUFF, MISSOURI and AFGE
45 FLRA 326 (1992)

(Extract)

I. Statement of the Case

This case is before the Authority on an application for review filed by three employees under section 2422.17(a) of the Authority's Rules and Regulations. The employees seek review of the Acting Regional Director's (ARD) report and findings dismissing their objection to the conduct of a representation election. Neither the Activity nor the Petitioner filed an opposition to the employees' application.

For the following reasons, we deny the application for review.

II. Background and Regional Director's Decision

The ARD conducted a mail ballot election in a unit of five employees. The ARD received and counted two ballots, which were cast for the Union. No additional ballots were received by the ARD. Subsequently, the ARD

received a letter from three employees, James E. Akers, Dennis R. Fowler, and Charles E. Moon, who asserted that they voted against Union representation and mailed their ballots according to the election requirements. They requested the ARD to rerun the election.

The ARD construed the employees' letter as an objection to the procedural conduct of the election. However, the ARD found that none of the employees was a party to the case and concluded that none had standing to object to the conduct of the election. Accordingly, the ARD dismissed the objection.

III. Application for Review

Employees Akers, Fowler, and Moon argue that they properly and timely mailed their ballots casting votes against Union representation. They assert that the election should not stand because it "does not represent the wishes of the majority." Application at 1.

IV. Analysis and Conclusions

We conclude, for the following reasons, that no compelling reasons exist within the meaning of section 2422.17(c) of the Authority's Rules and Regulations for granting the application for review.

Section 2422.[31] of the Authority's Rules and Regulations provides, in pertinent part, that a "party" may object to the conduct of an election. As relevant here, "party" is defined in section 2421.11(a) as a person: (1) filing or named in a charge, petition, or request; or (2) whose intervention in a proceeding has been permitted or directed by the Authority.

We find no compelling reasons to review the ARD's determination that none of the employees is a party to this case. It is undisputed that, as found by the ARD, none of the employees: was a party in the filing of the original representation petition in this case; none were granted intervention at any time; none participated in the election arrangements or signed, either individually or on behalf of other employees, the Election Agreement in this case. ARD Report at 3.

As review of the ARD's finding that none of the employees is a party is not warranted, review of the ARD's dismissal of the objection to the election also is not warranted. For example, General Services Administration Regional Office, Region 4, 2 Rulings on Requests for Review of the Assistant Secretary 379 (1976) (finding employees did not have standing, individually or collectively, to file objections to an election); Clarence E. Clapp, 279 NLRB 330 (1986) (in dismissing objection to election filed by eligible voter, the National Labor Relations Board noted

that it "has long held that individual employees are not 'parties' within the definition of 'party'" in the Board's regulations).

The employees have not demonstrated that review of the ARD's decision is warranted under the standards set forth in section 2422.17(c) of the Authority's Rules and Regulations. Accordingly, we will deny the application for review.

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b. <u>Improper Management Conduct</u> [The Neutrality Doctrine, 5 U.S.C. §§ 7102, 7116(a)(1), (2) and (3)].

Agency supervisors and managers are required to adhere to a position of neutrality concerning the employees' selection of a bargaining representative. Agencies may not become involved in the pros and cons of the selection of a bargaining representative nor which particular labor organization should be chosen.

Employees have a right to reject a labor organization and have a right to espouse their opposition. This fact is the basis for the inclusion of the "No Union," "None" or "Neither" choice on the ballot.

The restriction on the agency's right to become involved in the employees' selection of a bargaining representative does not mean that the agency is restricted from urging all employees to participate in the election. A program designed to provide maximum employee participation in the election through the use of posters, employee bulletins, loud speakers, or any other device is not only proper, but may be construed as an obligation of agency management. Agencies should be concerned with the maximum exercise of the franchise by employees to insure that, regardless of the outcome of the election, it reflects the choice of all or an optimum number of employees. See Labor Relations Bulletin No. 219 (DA, DCSPER, 8 Oct 85).

The campaigns conducted by participating labor organizations should be free from any management involvement. There are instances in which management may become involved. Section 7116(e) provides:

> "The expression of any personal view, argument, opinion or the making of any statement which--
>
> "(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,
>
> "(2) corrects the record with respect to any false or misleading statement made by any person, or
>
> "(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.

It may become necessary to police the electioneering material because it is scurrilous, inflammatory, or libelous. Where the agency is the subject of attack, it may become necessary in some extreme and rare instances to respond. However, such response should be confined to establishing the facts and not engaging in a partisan campaign. Any response should be considered carefully to insure that it is not a partisan approach; is designed solely to protect the image of the agency or to correct scurrilous, libelous, or inflammatory matters; and is not designed to oppose any of the labor organizations, urge a "No" vote, or exhibit favoritism to any of the labor organizations. Where the agency goes beyond this, as it did in Air Force Plant Representative Office, 5 FLRA 492 (1981), it may violate 5 U.S.C. § 7116(a)(1). In that case, the activity posted and distributed, shortly before a scheduled election, a "message implying that unions were unnecessary, undesirable, and difficult to remove once the employees voted in favor of exclusive recognition." Nevertheless, the activity spokesman may be critical of the union in the process of correcting the record, so long as the corrections are noncoercive, and do not threaten or promise benefits. AANG, Tucson and AFGE, Local 2924, 18 FLRA 583 (1985).

Department of the Army committed an unfair labor practice (ULP) by assisting a challenging union (Teamsters) prior to an election at Fort Sill, Oklahoma. DA, Fort Sill, Oklahoma, 29 FLRA 1110 (1987). In that case, DA officials, White House officials and Teamsters' representatives held a meeting in Washington, D.C., shortly before an election at Fort Sill prompted by the Teamsters challenge to the incumbent union (NFFE) for representation of a 2,500 member bargaining unit. The parties met to discuss the commercial activities program at Fort Sill. The Teamsters subsequently publicized this meeting in flyers distributed to bargaining unit members prior to the election. After the election, won by the Teamsters, NFFE filed a ULP against the Army for a breach of neutrality. The authority ultimately agreed, finding that the meeting interfered with employees' rights to freely choose their exclusive representative, and that the flyer distribution interfered with the conduct of a fair election. As a remedy the Authority ordered a new election.

Violations of campaign ground rules governing electioneering will not, as a general rule, be considered as a basis for objections to the election. The question to be considered in objections is not whether the agreement has been violated, but whether the alleged objectionable conduct "had an independent improper effect on the conduct of an election or the results of the election." It should be noted that an electioneering agreement may not restrain employees in the exercise of their rights under the statute.

In Department of the Navy, Naval Station Ingleside, Texas and NFFE, 46 FLRA 1011 (1992) the activity and the two rival unions entered into an Agreement for Consent Election. No one received a majority of the votes cast and one of the unions filed six objections to the election. The Regional Director found the objection to be without merit and dismissed them. The Authority affirmed. The issue was whether the alleged conduct interfered with the employees right to free choice or improperly affected the outcome of the election. The agency had investigated any complaints made prior to the election and had taken corrective action. This made it much easier for the Authority to find that any objectionable conduct was isolated and did not affect the outcome of the election.

Because supervisors and managerial employees are considered part of agency management, any action of a supervisor or managerial employee becomes the action of the agency. As such, supervisors and managerial employees must be made aware of their responsibilities in election campaigns. However, it is important to distinguish between management and supervisors and actions of other employees. In Department of Justice, Immigration and Naturalization Service, 9 FLRA 253 (1982), a Border Patrol Academy instructor made statements to his students favoring the International Brotherhood of Police Officers over AFGE. This occurred during a representation election campaign. The Authority disagreed with the ALJ and dismissed this portion of a ULP complaint. "Although § 7116(e) limits the types of statements that may be made by agency management during an election campaign, § 7102 protects the expression of personal views by employees during an election campaign." (Emphasis added.)

Unions with "equal status" must be given equivalent solicitation rights, whereas those with lower status normally are not given equivalent solicitation rights. The problem is defining the status of unions and, secondly, what equivalent solicitation rights are. See Gallup Indian Medical Center, Gallup, New Mexico, 44 FLRA 217 (1992), for a discussion of equivalent status and the rights associated with such status.

The incumbent exclusive representative, if there is one, will already have access to employees and may have negotiated in the collective bargaining agreement for the use of agency services and facilities such as an office, a telephone, and use of management distribution systems. The "no status" union is one which does not have a formal relationship with the unit employees. As discussed previously, management is not permitted to allow it on the installation to solicit employees. The exception would be if the union can make an affirmative showing that it cannot effectively contact the employees off the installation (*see* Barksdale Air Force Base).

Once the Regional Director notifies the parties that a notice of petition will be posted, the union is elevated to a higher status. DOD and Education Association of Panama, 44 FLRA 419 (1992). Management should give it some limited access to the employees. If an exclusive representative already represents the petitioned for employees, it is deemed to be a party to the election automatically (as discussed previously). The incumbent must be afforded the same access rights as the petitioning union, plus it will have its negotiated rights to services and facilities. Clearly, the challenging union even if it has achieved equivalent status, is only entitled to "customary

and routine" facilities. Section 7116(a)(3). If the incumbent has successfully negotiated the use of a building on the installation, for example, management is not required to provide a similar facility to the challenger. U.S. Army Air Defense Center, Fort Bliss, Texas, 29 FLRA 362 (1987).

See Pierce, The Neutrality Doctrine in Federal Sector Labor Relations, The Army Lawyer, July 1983, at 18, for a detailed discussion of the neutrality doctrine.

c. Challenged Ballots (5 C.F.R. § 2422.24).

Either party may challenge ballots; i.e., the right of an employee to vote. For instance, it may be alleged that an employee is not in the bargaining unit or is a supervisor. The challenged ballots are set aside and if the result of the count is so close that the challenged ballots could affect the outcome of the election, the Regional Director will investigate. If there is no relevant question of fact, the Regional Director will issue a report and findings, which may be appealed to the Authority.

If a question of fact exists, a hearing will be ordered and a decision made by an administrative law judge. This decision will be sent to the Authority, who will provide the final decision.

If the Regional Director determines that a substantial question of interpretation or policy exists, the case will be transferred to the Authority for a decision.

2-10. Purposes of a Petitions [5 C.F.R. § 2422.1].

In March 1996, the FLRA amended its rules relating to Representation Proceedings. The new rules provide for one type of petition where the party describes the purpose for the petition. Under the new rules, a petition may be filed for the following purposes: elections or eligibility for dues allotments, clarification or amendment of elections, or consolidation of two or more bargaining units.

Petition forms may be obtained from the Regional Office. The completed form is sent, with the supporting documents, to the FLRA Regional Office. The purposes for petitions are discussed more fully below.

a. An election to determine if employees in a unit no longer wish to be represented by an exclusive representative [5 C.F.R. § 2422.1(a)(2). .

The petition is filed by one or more employees or by an individual filing on their behalf. 5 C.F.R.§ 2422.2(b). It requires an election to determine if an

incumbent union should lose its exclusive representative status because it no longer represents a majority of employees in an existing union.

A decertification election must ordinarily be in the same unit as was certified. The petition must be accompanied by a showing of interest of not less than thirty percent of the employees indicating that the employees no longer desire to be represented by the currently recognized labor organization (5 C.F.R. §2422.1(c). The petition is subject to the timeliness requirements of 5 C.F.R. § 2422.12, and can only result in an election when there is a 30% showing of interest. 5 C.F.R. §2422.3(c). The election bar rule applies in those cases in which a union has been decertified and a petition for an election has been filed within 12 months of the decertification election. *See* Sacramento Army Depot and Michael M. Burnett, 49 FLRA 1648 (1994)(the Authority refused to order an election because the showing of interest did not clearly indicate a desire to decertify the union) **(Note: Although this case was decided prior to the adoption to the new rules in 1996, it is still persuasive authority on this issue).**

b. To Clarify or Amend a Recognition or Certification Then in Effect or Any Other Matter Relating to Representation. [5 C.F.R. §2422.1(b)].

A petition to clarify a unit is filed when a change has occurred in the unit composition as the result of a reorganization or the addition of new functions to a previously recognized unit. Its purpose is to clarify what the bargaining unit is and what employees are in it. It may be filed by an agency or a labor organization. . Because of the statutory changes in definitions of supervisors and management officials and because of reorganizations and transfers of functions, this is one of the most common representation petitions filed under the statute. A common example of the use of this petition is to determine whether an employee is in one of the categories excluded by 5 U.S.C. § 7112(b), such as a supervisor or manager. If so, the employee is not in a bargaining unit. *See e.g.*, Department of Agriculture, Forest Service, Chattahoochee-Oconee National Forests, Oconee Ranger Station, 43 FLRA 911 (1991); Norfolk Naval Shipyard, Portsmouth Virginia, 47 FLRA 129 (1993).

A petition may be filed to conform the recognition to existing circumstances resulting from nominal or technical changes, such as a change in the name of the union or in the name or location of the agency or activity. This petition may be filed at any time because it does not raise a question concerning representation. The petitioner merely wants to update the identity of the parties to the exclusive relationship. For example, the Authority changed the existing recognition to reflect the fact that the Civil Service Commission had been superseded by the Office of Personnel Management. OPM, 5 FLRA 238 (1981). For other examples of the use of this type of petition *see* Department of the Army, Rock Island Arsenal, 46 FLRA 76 (1992); Department of Health and Human Services, Administration for Children and Families, 47 FLRA 247 (1993).

c. Petition for Consolidation 5 C.F.R. § 2422.1(c).

An agency or exclusive representative may file a consolidation petition to consolidate previously existing bargaining units. 5 C.F.R. § 2422.2(c). The Authority has held that the revised rules do not allow a non-incumbent labor organization to act on behalf of the incumbent. U.S. Army Reserve Command 88th Regional Support Command Fort Snelling Minnesota and American Federation of Government Employees Local 2q144, AFL-CIO, et. al, 53 FLRA 1174 (1998).

Although it is has not been explicitly stated by the Authority, consolidation procedures will likely be similar to the procedures under the old rules. Under the former rules, there was a presumption favoring consolidation. *See* VA, 2 FLRA 224 (1979).

Under the old rules, once a union was certified as the exclusive representative of a consolidated unit, a new bargaining obligation was created that supersedes bargaining obligations that existed prior to the consolidation. HHS, SSA, 6 FLRA 202 (1981).

Precedent under the old rules established criteria for determining whether the consolidated unit is appropriate: community of interest, and effective dealings and efficiency of agency operations. *Compare* Department of the Navy, U.S. Marine Corps, 8 FLRA 15 (1982)(ordering consolidation of 22 units within the Marine Corps) *with* U.S. Army Training and Doctrine Command, 11 FLRA 105 (1983)(finding consolidation of 11 units inappropriate).

Recognition for the purpose of negotiating a dues allotment agreement was one of two new forms of recognition created by the FSLMRS. 5 C.F.R. § 2422.(a)(1)(ii) provides for filing a petition for such recognition. The unit petitioned for must satisfy the same criteria of appropriateness as a unit for which a union seeks exclusive recognition. However, unlike the 30% showing of interest requirement attaching to representation petitions, the union filing this petition must show that 10% of the employees in the proposed unit are members of the petitioning union. 5 C.F.R. § 2422.3(d). There can be no dues allotment recognition for a unit for which a union holds exclusive recognition.

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